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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THOMAS A. MASS, pro se and JANET A. MASS,
Petitioners,

v.

CITY OF CARLSBAD, a Municipal Corporation;
FIELDSTONE/LA COSTA ASSOCIATES LIMITED
PARTNERSHIP, a California Limited Partnership,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One

APPENDIX VOLUME I
(Petitioners' Selected Complaints)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

THOMAS A. MASS and JANET A. MASS, Plaintiffs

v.

CITY OF CARLSBAD, a Municipal Corporation; FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP, a California Limited Partnership, Defendants

Case No. N53303

SECOND AMENDED COMPLAINT FOR INVERSE CONDEMNATION, NUISANCE AND/OR NEGLIGENCE, REQUESTING DECLARATORY RELIEF, AND IN THE ALTERNATIVE, A WRIT OF MANDATE

PLAINTIFFS RESPECTFULLY REPRESENT:

FIRST CAUSE OF ACTION
(Inverse Condemnation)
(Plaintiffs vs. "The City" Defendants)

1. Plaintiffs are the owners and reside in the following described real property in the city of Carlsbad, San Diego County, California:

> Lot 26 of Carlsbad Tract No. 81-29 in the City of Carlsbad, County of San Diego, State of California, according to Map thereof No. 11423, filed in the Office of the County Recorder of San Diego, January 20, 1986, and commonly known as 2851 Torry Court.

2. The above described property is contiguous to said Torry Court on the north and Corte de la Vista on the south and is within a gated community known as Alicante Hills and is

bounded on the east by Bolero Street and on the west by Alicante Road.

3. The plaintiffs' home is a free standing single family residence with a 35' x 50' terrace on the ground floor, and a 10' x 40' balcony on the second floor which fronts on said Corte de la Vista.

4. Said terrace and balcony afford a 180` panoramic view overlooking the La Costa Golf Course and a direct and unobstructed forever view of the Batiquitos Lagoon and the Pacific Ocean, as well as the year round prevailing ocean breeze which is the property's primary use and value.

5. The plaintiffs' property is contiguous to the "Fairways Project" of the defendant Fieldstone/La Costa Associates Limited Partnership ("The Developer"), which is a planned development of 132 single family detached residences located south of Corte de la Vista, east of Alicante Road and north of the La Costa Golf Course.

6. The defendant City of Carlsbad is a public entity chartered and existing under the laws of the State of California ("The City").

7. That pursuant to the authority of the Subdivision Map Act "S.M.A." (Government Code §§ 66410-66499.37) "The City" adopted a "Subdivision Ordinance" (9417 § 2 (part) 1975) contained in Title 20 of the Municipal Code and at all times herein mentioned both the statute and ordinance were in full force and effect.

8. That pursuant to said statute and ordinance "The Developer" applied to "The City" for the approval of a planned unit development, hillside development, and a subdivision map (CT90-23/PUD 90-23/HDP 90-29), and the issuance of the related permits (map).

9. That on or about the 8th day of January 1991, "The City" approved the tentative map and on or about the 3rd day of September 1991, "The City" approved the final map for the construction of 132 single family detached homes on 41.09 acres known as "The Fairways Project."

10. "The Developer's" original plan and map and its application to "The City" requested that the location of the

access to the project should be on Alicante Road. "The City" denied the request and insisted that the access be moved to Corte de la Vista as a condition for the issuance of the necessary approval. An employee of the Planning Department of "The City" testified before the Planning Commission of "The City" at their meeting of October 3, 1990, in part as follows:

> "The project is proposed as a gated community. The gate design is single access off Corte de la Vista and it provides a turnaround area at the entrance. The location of the single access was dictated by staff. The original proposal came in with an access off Alicante Road; however, for traffic safety purposes, staff requested that the entrance be moved to Corte de la Vista." (See page 2 of plaintiffs' group Exhibit E.)

11. Alicante Road is a heavily traveled secondary road, Corte de la Vista is a low use residential street, approximately one-quarter of a mile long, ending with a dead end cul-de-sac on the east end and in a "blind" exit onto Alicante Road on the west end.

12. "The City's" Planning Department, Planning Commission and the City Council all relied and supported their decision to relocate the gate on considerations of the public safety, for the public at large, and not for any private purpose or use, including "The Developer" and the successor occupants of the project.

13. "The City's" requirement that "The Developer" relocate the access to the project for ingress and egress ("the gate") was for the express purpose of regulating traffic which is a function of government for the benefit of the public, and as such serves a public purpose and use. Traffic regulations was the public "improvement." The act of relocating "the gate" directly and wrongfully diverted the heavy traffic from Alicante Road and re-routed it to Corte de la Vista thereby increasing, unreasonably and excessively, the volume of traffic, and destroying the residential environment of the plaintiffs' home.

"The gate" will be constructed in its new location by "The Developer" as authorized and directed by "The City" and subject to its approval, and said gate will be accepted by "The City" by "The City's" integrating "the gate" into its public roadways.

14. That both Alicante Road and Corte de la Vista are public improvements and part of the public roads owned and maintained by "The City." The relocation of "the gate" by "The City's" affirmative action was not only by its substantial participation, but the sole and direct cause of creating and causing the condition that will result in the damaging and/or taking plaintiffs' property by the trespass, nuisance and air pollution more fully described elsewhere in plaintiffs' complaint.

15. As a direct result thereof, the flow of traffic will all enter and exit on Corte de la Vista which is a public street and not a private driveway, and integrated into the public streets on the admitted grounds for the public safety of the community as a whole and will dramatically and adversely increase the volume of traffic and change the residential environment.

16. The plaintiffs' homes are all oriented to take full advantage of the gallery location above Corte de la Vista so as to enjoy the 180 degree panoramic view and prevailing winds of the ocean. As shown in Exhibit B20 the plaintiffs' property is elevated above the street and the panoramic view is not affected. The prevailing wind from the ocean is in the direction to take the air pollution alleged elsewhere herein and waft it directly on plaintiffs' terrace and balcony to their damage. The "Fairways Project" as originally planned and submitted to "The City" for approval was not and has not been objected to by plaintiffs; as a matter of fact it was relied on by them in making the purchase of their home and improving the terrace with a Bar-B-Q and spa as seen in plaintiffs' group Exhibit B1-20. Neither the view nor the ocean breeze would be adversely affected by the original plan. It was "The City's" action in relocating the gate and changing the traffic pattern of a public street for the public use, for the public safety, which is the cause of the air pollution herein alleged.

17. That "The City's" taking is official governmental action in requiring that "The Developer" locate the access to the "Fairways Project" on Corte de la Vista, determined (albeit, mistakenly) that the safety concerns of the whole community would best be served by that location.

18. That as a direct and necessary result of the aforesaid official governmental action, the noise, dirt, odor, air pollution, flashing headlights and vibrations cause, and will continue to cause, a substantial interference with the use and enjoyment by plaintiffs of plaintiffs' homes, the loss of reasonable investment-backed expectations, and a diminution in its primary use and value.

19. That the governmental authorities acting on behalf of "The City" affirmatively required "The Developer" to locate the access in proximity to the plaintiffs' property, and "The Developer" carried out the governmental mandate exactly as required, so that said location of the access was in fact the official affirmative action of "The City". That based upon the above and foregoing, "The City" has "taken" and/or damaged the plaintiffs' property for a public use and has not given the plaintiffs "just compensation."

20. "The City" has an existing ordinance which at all times herein mentioned was in full force and effect, to wit: "Interim Traffic impact fee for Southeastern Area (La Costa)."

21. Subsection 18.42.020(e) of said Traffic ordinance defined "Trip" as follows: "Trip" means arrival at or a departure from a project by any motor vehicle averaged over a one-day period (12:01 a.m. to 11:59 p.m.) as determined according to Table 18.42.020(e).

22. That the Table (18.42.020(e)) provides that a single-family detached residence can be expected to generate ten "trips" on each weekday. That the 132 homes to be constructed in the "Fairways Project" will result in generating 1,320 "trips" each week-day.

23. The Court will take judicial notice that there are 1,440 minutes in each one day period; and that one motor vehicle every minute, entering and exiting a gate, together with braking

and accelerating within a one block distance will cause air and noise pollution to the plaintiffs and their property.

24. As a direct result and as a proximate consequence of the dust, dirt, debris, noxious odors, flashing lights and noise, the plaintiffs have been and will continue to be peculiarly and substantially damaged. That "The City," by locating the access to the "Fairways Project" across the street from the plaintiffs' homes, has caused an invasion and appropriation of their valuable property rights and their investment-backed expectations, which has rendered their property untenantable to the plaintiffs, being the essence of why they purchased the property for their residence and paid a premium for its location and view and constitutes a loss of its primary use and value and thus is a compensable taking under Article I, Section 19 of the California Constitution, as well as the Fifth Amendment of the federal Constitution.

25. That based upon the factual allegations herein, the plaintiffs state the facts to be and allege as follows:

(a) That the nuisance-trespass type activity that results from the traffic generated has caused a diminution in the value of the plaintiffs' property and has substantially interfered with their use and enjoyment of their homes by imposing on them a direct, peculiar and substantial burden, and as such, they are entitled to just compensation as a result of the taking and/or damaging of their property;

(b) That the air pollution caused by the traffic is effective physical appropriation, occupation or interference of a permanent nature by contaminating the air over their property, with toxic and non-toxic gaseous solids and/or liquids, and constitutes a compensable taking or damage and that this is true whether the relocation of the gate achieved an important public benefit or had only a minimal economic impact on the plaintiffs;

(c) That even if the effects of the relocation of the gate across from plaintiffs' property was not a possessory type of activity as hereinabove alleged and only constitutes a non-possessory type interference, the extent to which "The City's" decision has damaged or destroyed the plaintiffs' distinct

investment-backed expectations, as hereinabove alleged, are compensable, and the plaintiffs are entitled to just compensation.

(d) That the view and the prevailing ocean breeze were not the primary reasons why the plaintiffs purchased their home and improved the terrace at an additional cost of $50,000.00. They were the only reasons! The view and the breeze is still there but because of the nuisance, trespass and air pollution described herein, the plaintiffs have been denied use of these features. They have been denied the use of their terrace because of the dirt, noise and odors; and that although the view can be enjoyed from indoors, the house cannot be ventilated and cooled through open windows and doors by the ocean breeze because of the same dirt, noise and odors more fully described elsewhere herein, which make opening the doors and windows prohibitive;

(e) The plaintiffs purchased their home to enjoy the out-of-doors living and comfortable indoor living without air-conditioning, and both features have been substantially and significantly damaged and/or destroyed by the defendants and each of them as herein alleged;

(f) The plaintiffs have incorporated a group of photographs into their group Exhibit B1-20 which demonstrates in a tangible and concrete manner that what has been alleged as the reason for their purchase and subsequent improvements was not an after-thought but was a distinct investment-backed expectation.

26. That notwithstanding that no claim is required to be filed against "The City" by the plaintiffs in order to maintain their action (Government Code § 905.1), the plaintiffs did on the 26th of September, 1991, deliver to "The City" a copy of a first draft of a complaint, which included a cause of action for inverse condemnation.

27. As a result of the above-described damages to the names plaintiffs' property, they have been damaged in excess of one hundred thousand ($100,000.00) dollars, and by this reference plaintiffs here incorporate the specific allegations of damages in this complaint set forth.

28. As a direct and proximate cause of "The City's" relocating the gate from Alicante Road, the pattern and volume of traffic on Corte de la Vista has resulted in the creation of the nuisance and air pollution herein alleged.

29. Plaintiffs have received no compensation for their damages, nor has "The City" instituted eminent domain proceedings.

30. "The City's" decision to relocate the gate without paying to the plaintiffs the just compensation for the damage and/or taking of their property, is in violation of plaintiffs' due process rights, equal protection rights, proportionality rights, liberty and privacy rights, and the takings and/or damaging clause of both the state and federal Constitutions, both as applied and on its face.

31. The plaintiffs' property rights to exclude has been violated by the governmental decision which resulted in an invasion and interference with their right of a personal sanctuary in their homes.

32. "The City," by its decision and failure to justly compensate the plaintiffs, has deprived the plaintiffs of their constitutional right to a jury to determine their damages.

33. Plaintiffs have incurred and will incur attorneys', appraisal, environmental experts and engineering fees because of this proceeding, in amounts that cannot yet be ascertained, which are recoverable in their action under the provisions of Section 1036 of the Code of Civil Procedure.

34. An actual controversy has arisen and now exists between the plaintiffs and the defendants as to the legal consequences resulting from the facts that have and will occur as hereinabove alleged.

35. Plaintiffs desire a judicial determination of their rights and duties, and a declaration that they may pursue their remedies for damages.

36. A judicial declaration is necessary and appropriate in order that the parties may take appropriate steps to mitigate their damages; and will also serve considerations of judicial economy.

WHEREFORE, plaintiffs pray judgment against "The City" as follows:

A. A declaration of the rights and duties of the parties;

B. To permit the cause of action to pend the completion of construction and the sale of all the homes in the "Fairways Project;"

C. Thereafter, set the matter down for a jury trial to determine the amount of just compensation for the plaintiffs and each of them, together with interest at the legal rate from the date of the damages;

D. For reasonable attorneys', appraisal, environmental experts, and engineering fees, according to proof;

E. For costs of suit herein incurred; and

F. For such other and further relief as the Court may deem proper.

SECOND CAUSE OF ACTION
(Nuisance)
(Plaintiffs vs. "The Developer" Defendants)

37. Plaintiffs incorporate paragraphs 1 through 5 both inclusive of their First Cause of Action as though fully set out here.

38. "The Developer" is the largest single land owner of residential real estate in the La Costa area of the City of Carlsbad. It is, and has been for a number of years, actively engaged in planning and constructing new residential communities and holds itself out and does business under the assumed name of "Fieldstone of La Costa."

39. "The Developer" has a large staff and retains outside consultants and contractors to plan and develop its new subdivisions. "The Developer" has been working with "The City" for five years or more on its "Fairways Project."

40. The plaintiffs are informed and believe and thereon allege that in "The Developer's " original plan for the "Fairways Project" submitted to both the planning department and the planning commission of "The City," they located the access to said project on Alicante Road.

41. That the plaintiffs, prior to purchasing their home, investigated the proposed development below and adjacent to their property and were satisfied as to the proposed density, height and style of the homes to be built, and also relied on the location of the gate which was to be on Alicante Road. At that time, plaintiffs had no reason to believe that the gate to the development would be relocated across the street from them and would result in the nuisance, negligence, trespass and air pollution caused by the increased volume of traffic to their home. Plaintiffs were the first purchasers and selected their location over the other thirty-seven that were available.

42. The plaintiffs were justifiable in their reliance on these facts, as well as the residential character of the road that they would be contiguous to, never expecting "The City" to divert the heavy traffic of Alicante Road to Corte de la Vista and to relocate the gate to the project across the street from their home, or "The Developer" to concur.

43. The first notice that the plaintiffs had that the access may be located on Corte de la Vista (across the street from plaintiffs' homes) was on or about the 10th day of May, 1990, at "The Developer's" local office in La Costa.

44. The plaintiffs promptly made their objections to the location of access to the "Fairways Project" to "The Developer;" to "The City's" Planning Department and Planning Commission; as well as to the City Council.

45. "The Developer" never made any public objection to "The City's" decision to relocate the access of the "Fairways Project" (sometimes hereinafter referred to as the property in question, P.I.Q.). "The Developer" also failed to exhaust its administrative remedies or seek judicial review of "The City's" decision. "The Developer" knew or should have known that the relocating of the only gate to the "Fairways Project" to Corte de la Vista would result in damages to the property of others, and result in a nuisance, negligence, trespass and air pollution, but breached its duty to plaintiffs by failing to take any action to prevent or mitigate that result.

46. Commencing in August of 1991, "The Developer," with "The City's" full authorization, direction and approval,

commenced construction of "The Fairways Project" in a manner which constitutes a nuisance and/or negligence. Noise, noxious odors and dirt in the form of dust are blown onto plaintiffs' property by prevailing winds by "The Developer's" failure and refusal to take all necessary and reasonable precautions to prevent, reduce, or mitigate the emissions as aforesaid.

47. The aforementioned occupation, use, and maintenance of the P.I.Q. constitutes a nuisance within the meaning of Section 3479 of the Civil Code and is the proximate cause of its damages. Such occupation substantially and unreasonably interferes with the comfortable use and enjoyment of plaintiffs' property, and may well be harmful to plaintiffs' health.

48. On or about August 7, 1991, the plaintiff gave written notice to the "The Developer" of the injury the plaintiffs have experienced and expect to experience in the future (see plaintiffs' Exhibit "A"). Plaintiff requested "The Developer" to abate such unreasonable activity, but they have refused and continue to refuse to abate the nuisance and negligence as aforesaid.

49. As a proximate result of the nuisance created by "The Developer" and its acts and omissions as aforesaid, plaintiffs have been, and will be damaged by: (a) being denied the full use and enjoyment of their property; (b) the cost and or personal labor in cleaning the walks, furniture, windows and other appurtenances on a daily basis; (c) the value of the property has and will decline unless this nuisance is abated; (d) and may be hazardous to the plaintiffs' health.

50. In maintaining the nuisance and its acts of commission and omission as aforesaid, "The Developer" is acting with full knowledge of the damages being caused plaintiffs. Defendant's conduct is willful, oppressive and malicious. Accordingly, plaintiffs are entitled to punitive damages against defendants.

51. The above described dust, dirt, odors and noise have persisted and continue to persist. Plaintiffs have been denied the valuable use and enjoyment of their terrace and have been forced to keep their doors and windows closed. The focal point of plaintiffs' property is the terrace, for the view and the

prevailing winds from the ocean, all aspects of which have been destroyed or substantially reduced; they are the primary reason for the value of the property and the exclusive reason why plaintiff purchased the property and spent in excess of $50,000.00 to enhance the outdoor terrace (see Group Exhibit "B").

52. The activities above described interfere with plaintiffs' possession of their property and constitutes a continuing and temporary nuisance to plaintiffs. Unless "The Developer" abates such conduct, the plaintiffs will be denied the full use and enjoyment of their property during the site preparation, which is scheduled for a year, and construction, which could take several years.

53. The vibrations, fumes and noise are offensive to the senses and deny plaintiffs the free use and enjoyment of their property. Such interference with plaintiffs' comfortable enjoyment of life and property has resulted in the substantial reduction in the market value of their property.

54. The nuisance and negligence described above is "continuing" and will presumably come to an end. However, the nuisance that can be expected to start when construction is complete and the 132 homes are occupied, will be a "continuing and permanent" nuisance.

55. "The City" has an existing ordinance which at all times herein mentioned was in full force and effect, to wit: "Interim Traffic impact fee for Southeastern Area (La Costa)."

56. Subsection 18.42.020(e) of said Traffic ordinance defined "Trip" as follows: "Trip" means arrival at or a departure from a project by any motor vehicle averaged over a one-day period (12:01 a.m. to 11:59 p.m.) as determined according to Table 18.42.020(e).

57. That the Table (18.42.020(e)) provides that a single-family detached residence can be expected to generate ten "trips" on each weekday. That the 132 homes to be constructed in the "Fairways Project" will result in generating 1,320 "trips" each week-day.

58. The Court will take judicial notice that there are 1,440 minutes in each one day period; and that one motor vehicle

every minute, entering and exiting a gate, together with braking and accelerating within a one block distance will cause air and noise pollution to the plaintiffs and their property.

59. That as a direct and proximate cause of the dust, dirt, debris, noxious odors, flashing lights at night and street noise, the plaintiffs have been and will continue to be peculiarly and substantially damaged.

60. That the location of the access to the "Fairways Project" across the street from the plaintiffs' homes has caused a destruction of the valuable property rights and rendered their property untenantable. The unique property rights formerly enjoyed by the plaintiffs was the essence of the reason they purchased the property and paid a premium for its location and view.

61. The view is still there but cannot be enjoyed because of the dirt, noise and air pollution, as aforesaid.

62. The essence of the nuisance and/or negligence hereinabove described is that it damages, if not destroys, the plaintiffs' personal enjoyment of their terrace. It also has the effect of lessening the value of the property and may affect the health of the plaintiffs. It also requires that doors and windows be kept closed at all times, thereby will be forcing the plaintiffs to install air conditioning which they cannot tolerate.

63. The nuisance herein described is both a private and public nuisance which affects the entire neighborhood. "The Developer" has negligently caused or allowed the emission of fugitive dust from its active operation, use of unpaved roads, open storage pile, demolition, and disturbed surface area, so that the presence of such dust remains visible in the atmosphere above plaintiffs' property and deposits large amounts of visible particulate matter on plaintiffs and their property as a direct result of "The Developer's operations. "The Developer" has failed and refused to take all reasonable and necessary precautions to prevent, reduce, or mitigate the emissions as aforesaid. Upon completion of the project "The Developer" or its successors-in-title will cause continued air pollution, increasing the amount of ozone, exhaust contaminants, carbon monoxide, and fine particles that will be injurious to plaintiffs

and their property as herein more fully alleged, all as a direct result of their acts and omissions as aforesaid.

64. The "continuing" but temporary nuisance started in August 1991, and is expected to continue for at least a year. The permanent and continuing nuisance will take its place when construction is complete and the new owners occupy their residences. This permanent nuisance will remain in effect from that point on or unless abated, which is unlikely.

65. The nuisance is based on fault, and also on the basis of one person's property and/or activity injuring another's person and/or property, as well as "The Developer's" acts and omissions as aforesaid.

66. As a proximate result of the nuisance and/or negligence the value of plaintiffs' real property has been diminished by not less than $100,000.00, and further, they have been denied the full use and enjoyment of their property, and unless the nuisance is abated, plaintiffs' property will be progressively further diminished in value.

67. The exact damages that have been and will continue to be inflicted on the plaintiffs cannot at this time be determined, but will include loss of value, loss of use, clean-up expenses, repairs, and possible personal injuries and great physical, mental, and nervous pain and suffering. As a result of such injuries, plaintiffs have suffered general damages in an amount according to proof.

68. In maintaining the nuisance and its continuing negligence, "The Developer" is acting with full knowledge of the consequences and damage being caused to the plaintiffs, and their conduct is willful, oppressive, and malicious. Accordingly, plaintiffs are entitled to punitive damages against "The Developer" in a sum to be determined by the jury.

69. "The Developer" has failed to minimize the pollution caused by their site preparation, and further, has failed to implement a program of clean-up activities so as to allow the plaintiffs to make full use and enjoyment of their outdoor terrace entertainment center.

70. The successor in title to "The Developer" will be the 132 homeowners. Unless the new owners abate the nuisance or

are enjoined from continuing the nuisance, the plaintiffs will suffer permanent and continuing damages. The result of such nuisance will cause the plaintiffs irreparable injuries such as usefulness, the economic value of the plaintiffs' property will be substantially diminished, and the plaintiffs will be deprived of the comfortable enjoyment of their property.

71. The location of the access to the "Fairways Project" has an effect on the possession of the real estate that the prospective purchasers will occupy as their residences.

72. That because plaintiffs may seek a permanent injunction against the prospective owners, and further, because the possession of residences will be affected by the location of the access to the "Fairways Project," it is reasonable and necessary to give them actual or constructive notice of the pendency of this action, as well as the current and subsequent encumbrances.

73. An actual controversy has arisen and now exists between "The Developer" and their successor in title. That considerations of judicial economy as well as providing the parties an opportunity to mitigate their damages make a judicial declaration both necessary and appropriate.

74. The Civil Code §3479 states, "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property, . . . is a nuisance." Section 731 of the Code of Civil Procedure provides, "Any action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance. . . ." That by virtue of the acts and omissions of "The Developer" it has violated these provisions, as well as §41700 (nuisance) and §41701 (visible emissions) of the California Health and Safety Code, and §§402 (nuisance) and 403 of the South Coast Air Quality Management District.

75. That Section 3482 of the Civil Code provides that "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." "The City's" decision to relocate the gate does not expressly or impliedly authorize the nuisance herein described. "The City" did not

sanction a nuisance for itself. "The Developer" does not have a governmental immunity for its use of its property that causes damages to others. "The Developer's" remedy was and is against "The City," but has no defense against these plaintiffs based on Section 3482 of the Civil Code.

76. That based on the facts hereinabove well pleaded, "The Developer" has caused and is causing a nuisance and continuing its negligence during the preparation of the site and the construction of the "Fairways Project;" and will be creating a continuing and permanent nuisance which will be maintained by its successor in title by permitting close to 1,500 vehicle trips a day that will come in and out of the access gate and on to Corte de la Vista every day across the street from the plaintiffs' property.

WHEREFORE, plaintiffs pray judgment against "The Developer" as follows:

A. That as to those parts of this cause of action that have not ripened (the continuing and permanent nuisance), the Court declare the respective rights and duties of the parties and their privity;

B. That upon notice, motion and points and authorities, the Court conduct a hearing to determine the legality of granting plaintiffs their right to file a Lis Pendens notice with the County Recorder in accordance with Code of Civil Procedure §§409-409.9;

C. A declaration of the rights and duties of the parties;

D. For general, special, and punitive damages in accordance with proof;

E. For reasonable attorneys', appraisal and engineering fees according to proof;

F. For costs of suit herein incurred; and

G. For such other and further relief as the Court may deem proper.

PLAINTIFFS REQUEST TRIAL BY JURY AND THAT THE JURY BE PERMITTED TO VIEW THE "P.I.O." AND THE PLAINTIFFS' PREMISES.

THIRD CAUSE OF ACTION
IN THE ALTERNATIVE
(Writ of Mandate)
(Plaintiffs vs. "The City" Defendant)

77. Plaintiffs incorporate paragraphs 1 through 6 both inclusive of their First Cause of Action as though fully set out here.

78. Under the authority and direction of the Subdivision Map Act (Government Code §§66410-66499.37) hereinafter for convenience referred to as "S.M.A.," the control of the design and improvements is vested in "The City" and it is required to enact a subdivision ordinance to supplement and implement the "S.M.A." which it did and is known as the "Subdivision Ordinance" (9417 §2 (part) 1975 and is contained in Title 20 of the Municipal Code).

79. Section 20.12.080 of the Subdivision Ordinance provides in part that the Planning Commission is authorized and directed to: "(1) Hold a public hearing on all tentative maps. Any interested person may appear at the hearing and shall be heard;" likewise, in Section 20.12.090 the City Council is required to: "(b) The City Council shall hold a public hearing on the tentative map. Any interested person may appear at such hearing and shall be heard."

80. The "S.M.A." provides in part that the control of the design and improvements is vested with the city and county governments with consideration for their relation to the adjoining areas and they are required to exercise discretion in determining relevant facts. The time within which to seek judicial review is extremely short and only a limited right to examine the reasonableness of their decision is provided for.

81. That pursuant to Section 20.12.092 of the Subdivision Ordinance, the plaintiffs received a notice for a meeting of the City Council on December 18, 1990, a copy of which is attached hereto and incorporated herein as Exhibit "C."

82. At said meeting employees of the Building, Engineering and Planning Department reviewed the background and the plans and specifications of "The Fairways Project."

The Assistant City Attorney also made comments and recommendations.

83. Employees and consultants of "The Developer" (Fieldstone Company) then put on a slick "dog and pony" demonstration, including, maps, photographs, and a slide presentation in support of the "Fairways Project."

84. That plaintiffs appeared at said meeting along with other interested parties and pursuant to the rules of "The City" were granted five minutes in which to speak as individuals and ten minutes for presentations on behalf of a group. A copy of the Agenda is attached hereto in support of this allegation as Exhibit "D."

85. That the plaintiff on his own behalf and also as the spokesperson for the Alicante Hills Homeowners Association, a California Corporation, voiced his objections to the Planning Department, the Planning Commission, as well as the City Council, to wit: The location of the access to the Project should be moved from Corte de la Vista back to Alicante Road where "The Developer" had originally requested it; that by placing the gate to the "Fairways Project" on Corte de la Vista, the City of Carlsbad has increased tenfold the probability that an accident would occur at the "blind spot" which exists when exiting Corte de la Vista on to Alicante Road; that the costs associated with compensating individuals for injuries incurred as a result of approval of the tentative map, with knowledge of such increased risks, will be unfairly born by the taxpayers of Carlsbad; and lastly, that plaintiffs' property value will decrease substantially due to the significant increase in noise, light, fumes, dust, dirt, and vibrations which will emanate from the 132 single family homes in and out of the planned unit development gate, the entrance being located below plaintiffs' property on Corte de la Vista, instead of Alicante Road. A copy of the Planning Commission's minutes of October 3, 1990 is attached hereto and incorporated herein by reference as Exhibit "E."

86. Thereafter, both "The Developer" and "The City" were given unlimited time, as they were in making their original presentation, to rebut the objections made by the public, including your plaintiffs. At no time was plaintiff given an

opportunity to cross-examine the witnesses who testified in favor of the plan. Nor was plaintiff allowed time to rebut the evidence which was marshaled in support of the plan.

87. On or about January 8, 1991, the tentative map was approved by the City of Carlsbad. However, the tentative map was subject to a number of conditions. In addition, the tentative map still had to comply with the final map requirements contained in Chapter 20.20 of the "City's" Subdivision Ordinance. Thereafter, without further notice or public hearings, the final map was approved by the City Council on or about September 3, 1991. This fact was discovered by plaintiffs on September 6, 1991, upon making inquiry with the Planning Department of "The City" as to the time limitation in which to seek judicial review of the City Council's decision. Plaintiffs were informed that the specific period of time in which to seek judicial review was not within the offhand knowledge of this particular employee, but that an investigation would be made and an answer provided as soon as possible. To date, plaintiffs have yet to hear from any employee at the Planning Commission as to the limited time in which to seek judicial review of the City Council's decision.

88. That the plaintiffs believe, and so state the facts to be, that in this case, the approval of the final subdivision map was not a mandatory act, and "The Developer" had no vested right and was subject to all the requirements of the "S.M.A." and "The City's" subdivision ordinance that was in force at the time of the approval of the tentative map, plus the express conditions of the said approval as set forth in plaintiffs' Exhibit E are such that they required the use of discretion, and thus this action was brought within ninety days of the approval of the final map.

89. Section 66499.37 of the S.M.A., setting the time limits in which to seek judicial review of a decision of the City Council, clearly does not distinguish between a decision approving a tentative map and one approving a final map. That in this case, the City Council does not have to approve the final map unless it is satisfied with the plan of subdivision. Furthermore, it could act other than to approve the final map. Accordingly, the approval of the final map by the City Council

was a decision for the purposes of Section 66499.37. Under these circumstances, "The City" was under a duty to give the plaintiffs notice and an opportunity to be heard but they failed to do either.

90. The dynamics of the relationship between "The City" and "The Developer" is such that even if the law was such that "The City" could not act other than to approve the final map, as a matter of fact they could withhold the approval for any reason or no reason at all. This is so because "The Developer" is the single largest owner of vacant real estate in the La Costa area of the City of Carlsbad and has one project after another in which they interface with "The City." Furthermore, unless the demand by "The City" is a clear overreaching and would be extremely costly to comply with by "The Developer," they would find time delays to seek injunctions or writs too costly to bear. Accordingly, "The Developer" is effectively under economic compulsion to "cooperate" with "The City;" unless they elect to fight the decision. Thus, the City Council can exercise discretion and disapprove a final map, even though it complies with the conditions of the tentative map. The Court should take judicial notice of these facts.

91. As to the hearings leading up to the approval of the tentative map, the plaintiffs admit to having received notice, but state that the notice was fatally defective for the following reasons:

(a) it failed to state that the decision on the tentative map was or could be the final decision on the application, and if judicial review was desired the objector had only 90 days within which to do so;

(b) it failed to state that the approval of the final map would be made without notice and without a hearing and that it would be, or could be, only a ministerial act and not subject to review;

(c) it failed to state that if they did not appeal the decision they may lose valuable property rights by virtue of the doctrines of res judicata and/or collateral estoppel.

92. At all times herein mentioned there was in full force and effect an ordinance of "The City" which provides, in

substance, that time limits for judicial review of any decision of "The City," made pursuant to Code of Civil Procedure § 1094.5, afford certain individuals "actual notice" of any decision affecting their rights. Said notice must state that, "Any petition or paper seeking judicial review must be filed in the appropriate court not later than the ninetieth day following the date on which the decision becomes final; . . ." (Chapter 1.16 §1.16.010).

93. That "The City" has a clear duty to advise a party to an adjudicatory proceeding of the time limit within which to seek judicial review of the decision in an action under Section 1094.5; all the more so they have a duty to plaintiffs who have substantial and significant property rights at risk by virtue of proceedings under their Subdivision Ordinance. The fact that a hearing leading up to a final decision has the unfortunate and misleading label of "tentative approval" of the map, further exasperates objectors and lulls them into a false sense of security, and "The City" is under an affirmative duty to furnish persons entitled to notice to explain that tentative is final and the consequences of that fact.

94. Neither the hearing nor the notice conform to the standards of the "due process" clause of the Federal or State Constitution. Therefore, the decision is null and void as to plaintiffs and should be set aside as being unconstitutional as applied to plaintiffs in this case.

95. The Subdivision Ordinance of "The City" as well as "S.M.A." is invalid and unenforceable on its face and as construed and as applied by "The City" as against the plaintiffs. It violates the due process clause and the equal protection clause of the United States Constitution as well as the California Constitution.

96. The hearings hereinabove identified were a sham and a fraud on the plaintiffs. "The City" knew or should have known that the notice and hearing provided was an abuse of authority and discretion. Substantial and significant property interests of the plaintiffs were involved and the notice given was not meaningful. In fact, the notice given by "The City" was false and misleading by failing to expressly notify plaintiffs of

the time limit within which to seek judicial review together with the disastrous consequences of res judicata and/or collateral estoppel for any cause of action the plaintiffs have or could have. The hearings did not permit discovery. They limited the individual to five minutes and group spokespersons to ten minutes. In addition, there was no right of cross-examination of witnesses who testified for "The City" or "The Developer." Furthermore, "The City" and "The Developer" were permitted to give their arguments and conclusions without any factual basis and without any time limitation. Lastly, plaintiffs were given no opportunity to rebut the testimony which was presented in support of the plan.

97. The Court is requested to take judicial notice that the City Council had discretion to determine the facts; that a hearing is required by law; that any interested person may appear at such hearing and shall be heard; and that evidence is required to be taken.

98. The plaintiffs have exhausted their administrative remedies and have no plain and speedy remedy in the ordinary course of the law other than that which this complaint provides.

99. That pursuant to Government Code § 1028.2 and/or Code of Civil Procedure §1028.5, the plaintiffs are requesting reasonable attorney's fees and expenses in addition to other ordinary and necessary costs incurred in this case as well as private attorney's general fees.

100. That based upon the above and foregoing, plaintiffs allege that a writ of mandate is necessary to protect the substantial rights of the plaintiffs and each of them and that substantial damages will be suffered by them if the request for the writ is denied. Such damages include the diminution in value and the loss of use and enjoyment of their property.

101. The first notice that the plaintiffs had as to the nature and extent of their damages occurred the first part of August 1991, when "The Developer," through its employees and agents, commenced grading and installing storm sewers on the property in question (P.I.Q.) with trucks, bulldozers, back hoes, earth movers and miscellaneous construction equipment, and used a driveway which is across the street and less than 100 feet

west of the named plaintiffs' property, for ingress and egress. This is a continuing nuisance and can be expected throughout construction and thereafter, when vehicles of all descriptions will (and at all hours of the day and night) be coming in and out to the 132 home subdivision.

102. That "The City" knew or should have known that plaintiffs believed that they had notice of all their rights; that the plaintiffs relied that "The City" had given them full notice of their rights, and have been damaged thereby. "The City" prevented the issues from being properly raised, and could not have been raised by the plaintiffs, who used reasonable diligence, and therefore are estopped from asserting the defense of failing to seek judicial review in a timely manner.

103. "The Developer" did not acquire a vested right upon the approval of the tentative map, they did not have a valid building permit nor perform substantial work and incur substantial liability in good faith reliance on the approval of the tentative map, and thus "The City" could have and should have held additional adjudicative, discretionary hearings subject to notice and an opportunity for plaintiffs to be heard, which they failed to do.

104. The Government Code provides the "The Developer" with a statutory equivalent of a vested right; principal among these are the Development Agreement, §§65864-65869.5, and the Vesting Map Act, §§66498.1 - 66498.9. "The Developer" did not avail itself of this protection.

105. Government Code §66468 provides that the filing for record of the final map shall automatically and finally determine the validity of such map. The final map in this case was not filed until December 20, 1991, as document number 1991-0662811, two full months after plaintiffs' suit was on file.

106. Chapter 4, Article 1 of the "S.M.A." provides the requirements for approval of a subdivision. § 66473 provides that a map shall be disapproved for failure to meet the requirements of the "S.M.A." or the local ordinance. The only qualification being that ". . . a final map shall be disapproved only for failure to meet or perform requirements or conditions

which were applicable to the subdivision at the time of the approval of the tentative map . . ."

107. Further, §66474 provides in part that a map shall be denied if the design or improvement of the proposed subdivision: (a) is not consistent with the general and specific plans of the community, or (b) is likely to cause substantial environmental damage.

108. The facts alleged in this complaint support the allegations of the creation of a nuisance, trespass, and air pollution, thus was not consistent with the general and specific plans of the community and is and will cause substantial environmental damage.

109. That the plaintiffs received no notice and no opportunity to a hearing of the proceedings leading up to the approval of the final map which was, or ought to have been, an adjudicative, discretionary hearing.

110. The plaintiffs filed their complaint within forty-five days from the approval of the final map (and within two and a half months from the commencement of the site preparation) and are entitled to judicial review.

111. As hereinabove alleged, Title 1, § 1.16.010 of the City of Carlsbad Municipal Code provides for time limits for judicial review. It provides in substance that upon making a final decision, "The City" shall provide notice to the party the time within which judicial review must be sought as part of the decision. No such notice was given by "The City" to these plaintiffs.

112. §1.16.020 of said Title, though not applicable to these plaintiffs, bars court action to " . . . attack, review, set aside, void, annul or seek damages or compensation for any city decision . . ." (emphasis added). Government Code §66499.37 which bars court action does not bar actions which only "seek damages or compensation."

113. That the plaintiffs allege upon information and belief and based thereon state the facts to be that they have sought judicial revision within 90 days of September 3, 1991, approving the final map and that decision was the final and appealable order.

114. That plaintiffs allege upon information and belief and based thereon state the facts to be that: They were not parties nor in privity with the parties in the proceeding below; §66499.37 of "S.M.A." is not applicable to an action for compensation.

115. Government Code §66499.37 only applies to an action to attack the decision of the public agency involved. Count I of this complaint only seeks compensation because of the damages and taking caused by the decision to relocate the gate.

116. In this count, plaintiffs do not seek a writ of mandate unless the court finds that the approval of the final map was the final and appealable order or that the proceedings were unconstitutional and null and void.

117. That in the event that the court finds that the complaint was filed in a timely manner, the plaintiffs allege and state the facts to be that the decision to relocate the gate based on public safety, did not advance the legitimate governmental interest because the fact is that it created a greater danger for the public and was counter-productive and did not substantially advance a legitimate governmental interest.

118. The plaintiffs believe and state the facts to be that "The City's" decision was improvident and flawed, and there is a greater danger of injuries and fatalities by increasing the traffic that exits from Corte de la Vista because it is a "blind" exit to northbound traffic going north and constitutes a negligent design of traffic management.

WHEREFORE, plaintiffs pray for a judgment against "The City" as follows (if they do not voluntarily relocate the access to the "Fairways Project" to Alicante Road as originally designated by "The Developer"):

A. Make findings of fact and conclusions of law and enter judgment thereon that the plaintiffs were not parties nor in privity with the parties relating to the "decision" of "The City" to locate the access to the "Fairways Project" on Corte de la Vista;

B. Make findings of fact and conclusions of law and enter judgment thereon that § 66499.37 of the "S.M.A." is not

applicable to bar plaintiffs from an action or actions for compensation;

C. Make findings of fact and conclusions of law and enter judgment thereon that "The City" is estopped from defending plaintiffs' action for just compensation on the basis of failing to seek judicial review in a timely manner;

D. Make findings of fact and conclusions of law that the proceeding resulting in "The City's" decision to relocate the access to the "Fairways Project" was in violation of the plaintiffs' due process and equal protection rights under both the federal Constitution and the State of California Constitution;

E. Make findings of fact and conclusions of law that the Subdivision Ordinance and "S.M.A." statute are both unconstitutional on their face and as applied to plaintiffs.

F. For a supplemental hearing re attorney fees and costs, including the cost of the record in the proceeding before "The City" if necessary, and attorneys' fees for services as a private Attorney General;

G. For such other and further relief as may be meet and proper in the premises.

Dated: May 22, 1992

THOMAS A. MASS
Plaintiff In Pro Per

JANET A. MASS
Plaintiff In Pro Per

VERIFICATION

I, THOMAS A. MASS, am one of the plaintiffs in the above-entitled action. I have read the foregoing SECOND AMENDED COMPLAINT FOR INVERSE CONDEMNATION AND NUISANCE REQUESTING DECLARATORY RELIEF AND IN THE ALTERNATIVE A WRIT OF MANDATE, and know the contents thereof. The same is true of my own knowledge except as to those matters which are therein alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Executed at Carlsbad, California, this 22nd day of May, 1992.

THOMAS A. MASS
2851 Torry Court
Carlsbad, CA 92009
Phone: (619) 931-0100
FAX: (619) 438-7850

PLAINTIFFS DEMAND TRIAL BY JURY

PROOF OF SERVICE OMITTED IN PRINTING

From the Desk of
THOMAS A. MASS

7 August 1991

The Villages of La Costa
P.O. Box 9000-266
Carlsbad, CA 92009

Attention: Mrs. Bradstreet

Re: Fieldstone Company's Fairways Project

Dear Neighbor:

I have been meaning to go on record with you as to my objections to your project, The Fairways. This a.m. at 4:30 your grading contractor started unloading its heavy duty equipment and it sounded like "operation Fairway storm." This "serenade" under our bedroom window provided me with the motivation to get this letter off without delay.

As you know, Courte de La Vista "T's" into Alicante Road, and this exit is blind to traffic coming up the hill. Because of the tenforld increase in traffic, it's reasonable to expect an accident and all the tragic things that will result. Therefore, I urge you not to plac eyour entrance on Courte de La Vista, but rather, on Alicante Road.

The entrance of Courte de La Vista also adversely affects the residential nature of the street we front on; we can expect noise, fumes, flashing headlights in our homes, etc., which were designed to capitalize on the tranquil view and fresh air. You have made a residential low use road into a high traffic artery.

EXHIBIT A

You have shown no sensitivity for the safety or aesthetics of our community. In mitigation, you should minimize these assaults on our environment by such steps as" low one-story homes at the high entryway; install glass walls on the homes that front on Courte de La Vista between Alicante Road and the entryway; speed and quiet zone signs; and appropriate landscaping.

Your future conduct will show your intentions.

Very truly yours,
THOMAS A. MASS

TAM/ds

PLAINTIFFS' GROUP EXHIBIT B

1. From balcony looking down at terrace towards the S.W.
2. From balcony looking down at terrace toward the S.E.
3. From balcony looking toward the S.E.
4. From balcony looking toward the S.E. and Barbecue
5. Balcony off of master bedroom suite looke E.
6. Terrace from E. side looking S.
7. Terrace from W. side looking S.E.
8. Terrace from N.W. corner looking to S.E. corner.
9. Terrace from N.E. corner looking to S.W. corner.
10. Terrace from E. side looking toward the W.
11. Terrace fromhe S.E. corner looking N.W.
12. Steam table, grill, sink, and refrigerator in entertainment center.
13. Terrace from entertainment center to the spa.
14. From entertainment center to house off of living room.
15. Panorama looking W.S.W.
16. Panorama looking S.W.
17. Panorama looking S.

EXHIBIT B

18. Panorama looking S.S.E.

19. Panorama looking S.E.

20. Panorama looking E.

All photographs in plaintiff's group exhibit were taken by Thomas A. Mass on the 28th day of September 1991. The directions indicated above are only approximate and relative. The photographs (B1 to B20 are a true representation of what they purport to show.

NOTICE OF PUBLIC HEARING
CT 90-23/PUD 90-23/HDP 90-29

NOTICE IS HEREBY GIVEN that the City Council of the City of Carlsbad will hold a public hearing at the City Council Chambers, 1200 Carlsbad Village Drive (formerly Elm Avenue), Carlsbad, California, at 6:00 P.M., on Tuesday, December 18, 1990, to consider an application for a tentative map, planned unit development and hillside development permit for 132 single family detached homes on 41.09 acres of land in the RDM zone and Local Facilities Mnagement Zone 6 on property generally located south of Corte de la Vista, east of Alicante Road and north of the La Costa Gold Course and more particularly described as:

> Parcel 2 of Parcel Map No. 11722, in the City of Carlsbad, County of San Diego, according to map thereof filed in e office of the County Recorder of San Diego County on October 10, 1981 as file no. 81-322184 of Official Records.

If you have any questions regarding this matter, please call the Planning Department at 438-1161.

If you challenge the Tentative Tract Map/Planned Unit Development/Hillside Development Permit in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice or in written correspondence delivered to the City of Carlsbad City Clerk's Office at or prior to the public hearing.

APPLICANT: Fieldstone Company
PUBLISH: December 6, 1990
CARLSBAD CITY COUNCIL

MAP OMITTED IN PRINTING

EXHIBIT C

CITY OF CARLSBAD
CITY COUNCIL MEETING
CARLSBAD MUNICIPAL WATER DISTRICT MEETING
HOUSING AND REDEVELOPMENT COMMISSION MEETING

AGENDA
DECEMBER 18, 1990

NOTICE TO THE PUBLIC

1. Citizens may have an item listed on the agenda by sumbitting a letter to the City Manager ten (10) days prior to the meeting.

2. It is Council's policy to adjourn meetings no later than 10:00 P.M.

3. Meetings are divided into categories shown below.

4. When you are called to speak, please come forward and state your name and address.

CONSENT CALENDAR: If you desire to talk about an item on the Consent Calendar, a written **"Request to Speak"** form must be filed with the City Clerk prior to the time the Consent Calendar is called. The items listed under Consent Calendar are considered routine and will be enacted by one motion as listed. There will be no separate discussion on these items prior to the bote, unless an item is removed.

PUBLIC COMMENT: If you desire to speak about an item not listed on the agenda, a pink **"Time Reservation Request"** form should be filed with the City Clerk. A total of 15 minutes is provided for the Public Comment portion of the Agenda. Speakers are limited to three (3) minutes each.

EXHIBIT D

In conformance with the Brown Act, no action can occur on items presented during Public Comment.

PUBLIC HEARINGS: It is not necessary to file a request to speak on items listed on this agend as Public Hearings.

ALL OTHER CATEGORIES: For all other agenda items a **"Request to Speak"** form must be filed with the City Clerk before the item is announced. There is a five (5) minute time limit for individual speakers.

MINUTES

Meeting of:	PLANNING COMMISSION
Time of Meeting:	6:00 p.m.
Date of Meeting:	October 3, 1990
Place of Meeting:	City Council Chambers

MINUTES OMITTED IN PRINTING, EXCEPT PAGE 2, PARAGRAPH 3:

> "The project is proposed as a gated community. The gate design is single access off Corte de la Vista and it provides a turnaround area at the entrance. The location of the single access was dictated by staff. The original proposal came in with an access off Alicante Road; however, for traffic safety purposes, staff requested that the entrance be moved to Corte de la Vista."

EXHIBIT E

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

THOMAS A. MASS and JANET A. MASS, Plaintiffs

v.

CITY OF CARLSBAD, a Municipal Corporation; FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP, a California Limited Partnership, Defendants

Case No. N53303

THIRD AMENDED COMPLAINT FOR PLAINTIFFS' THIRD CAUSE OF ACTION FOR A WRIT OF MANDATE IN THE ALTERNATIVE.

PLAINTIFFS RESPECTFULLY REPRESENT:

Procedural Perspective

On July 27, 1992 this Court entered an order sustaining defendants' demurrer to plaintiffs' second amended complaint in its entirety. Plaintiffs' First Cause of Action for inverse condemnation against "The City," and their Second Cause of Action based on nuisance/negligence against "The Developer" were sustained without leave to amend. As to the plaintiffs' Third Cause of Action which was in the alternative requesting a Writ of Mandate against "The City," the Court granted plaintiffs ten days in which to amend.

Procedural Prospective

This third cause of action is based on only one set of facts and alternative theories of recovery. Primary among them is an action for deprivation of constitutional rights under color of state law, brought pursuant to the federal Civil Rights Act, Title 42 U.S.C. §1983, providing remedies for the defendants' deprivation of plaintiffs' civil rights. The facts set forth hereinafter would also support recovery on the basis of

California common law, and statutory law, as well as by the Fourteenth Amendment guaranty of due process of law clause of the federal Constitution and Article I, §7 of the California Constitution both of which require a meaningful notice and a fair trial before an individual can be deprived by the government of a fundamental interest, including their interest in real estate. By this action plaintiffs seek all legal and equitable relief to which they may be entitled to as redress, including, but not limited to, compensatory, declaratory and injunctive relief as well as attorney's fees and costs, and prejudgment interest.

Stating separate causes of action for each of the various theories available would not aid the parties nor the Court, but would complicate the plaintiffs' third cause of action, would be redundant, and not serve the purposes for which separate theories of recovery require that they be set forth in separate causes of action.

THIRD CAUSE OF ACTION

Writ of Mandate
(In The Alternative)
(Plaintiffs vs. "The City" Defendant)

1. Plaintiffs are citizens of the United States and are the owners and reside in the following described real property in the city of Carlsbad, San Diego County, California:

> Lot 26 of Carlsbad Tract No. 81-29 in the City of Carlsbad, County of San Diego, State of California, according to Map thereof No. 11423, filed in the Office of the County Recorder of San Diego, January 20, 1986, and commonly known as 2851 Torry Court.

2. The above described property is contiguous to said Torry Court on the north and Corte de la Vista on the south and is within a gated community known as Alicante Hills and is bounded on the east by Bolero Street and on the west by Alicante Road.

3. The plaintiffs' home is a free standing single family residence with a 35' x 50' terrace on the ground floor, and a 10' x 40' balcony on the second floor which fronts on said Corte de la Vista.

4. Said terrace and balcony afford a 180` panoramic view overlooking the La Costa Golf Course and a direct and unobstructed forever view of the Batiquitos Lagoon and the Pacific Ocean, as well as the year round prevailing ocean breeze which is the property's unique and primary use and value.

5. The plaintiffs' property is contiguous to the "Fairways Project" of the defendant Fieldstone/La Costa Associates Limited Partnership ("The Developer"), which is a planned development of 132 single family detached residences located south of Corte de la Vista, east of Alicante Road and north of the La Costa Golf Course and west of San Marcos Creek.

6. The defendant City of Carlsbad is a public entity chartered and existing under the laws of the State of California ("The City").

7. Alicante Road is a heavily traveled secondary road with a turn lane in the median; on August 23, 1984, "The City" barricaded Alfil Way at the western side of San Marcos Creek and created a cul de sac at the barricade and thereby blocked through traffic to La Costa Avenue. This street later was renamed Corte de la Vista (court of view) and was a little used non-through traffic residential street, not much longer than a quarter of a mile (for a map of the area see plaintiffs' Exhibit "C").

8. Plaintiffs' predecessor in title, to capitalize on the environment created by "The City," obtained from "The City" the necessary approval to carve out of the hillside above the new Corte de la Vista a plateau for a stable and suitable site to build a corridor of thirty-eight homes. The spectacular panoramic view afforded by this location was appropriately reflected in the price of the homes.

9. The plaintiffs' developer obtained title to this tract of land from "The Developer's" predecessor in title who subjected the remainder to height restrictions.

10. The plaintiffs confirmed this fact, as well as the fact that the original plan and map for the "Fairways Project" located the access to the proposed project on Alicante Road, and in reliance thereon purchased their residence as aforesaid.

11. The reason why the plaintiffs paid a premium for their location and further enhanced their terrace with a Bar-B-Q, spa and full landscaping, is because they use and enjoy the facilities for year round outdoor living for their leisure and recreation. Further, the location permitted their home to be cooled by fresh, clean air from the ocean, making air conditioning unnecessary. This factor was important to them for reasons of health and comfort and because they cannot tolerate air conditioning.

12. Under the authority and direction of the Subdivision Map Act (Government Code §§66410-66499.37) hereinafter for convenience referred to as "S.M.A.," the control of the design and improvements is vested in "The City" and it is required to enact a subdivision ordinance to supplement and implement the "S.M.A." which it did and is known as the "Subdivision Ordinance" (9417 §2 (part) 1975 and is contained in Title 20 of the Municipal Code).

13. That pursuant to said statute and ordinance "The Developer" applied to "The City" for the approval of a planned unit development, hillside development, and a subdivision map (CT90-23/PUD 90-23/HDP 90-29), and the issuance of the related permits (map).

14. Section 20.12.080 of the Subdivision Ordinance provides in part that the Planning Commission is authorized and directed to: "(1) Hold a public hearing on all tentative maps. Any interested person may appear at the hearing and shall be heard;" likewise, Section 20.12.090 states: "(b) The City Council shall hold a public hearing on the tentative map. Any interested person may appear at such hearing and shall be heard."

15. The "S.M.A." provides in part that the control of the design and improvements is vested with the city government with consideration for their relation to the adjoining areas and they are required to exercise discretion in determining relevant facts. The time within which to seek judicial review is extremely

short and only a limited right to examine the reasonableness of their decision is provided for.

16. That pursuant to Section 20.12.092 of the Subdivision Ordinance, the plaintiffs received a notice for a meeting of the City Council on December 18, 1990, a copy of which is attached hereto and incorporated herein as Exhibit "C."

17. "The Developer's" original plan and map and its application to "The City" requested that the location of the access to the project should be on Alicante Road. "The City" denied the request and insisted that the access be moved to Corte de la Vista as a condition for the issuance of the necessary approval. An employee of the Planning Department of "The City" testified before the Planning Commission of "The City" at their meeting of October 3, 1990, in part as follows:

> "The project is proposed as a gated community. The gate design is single access off Corte de la Vista and it provides a turnaround area at the entrance. The location of the single access was dictated by staff. The original proposal came in with an access off Alicante Road; however, for traffic safety purposes, staff requested that the entrance be moved to Corte de la Vista." (See page 2 of plaintiffs' group Exhibit "E.")

18. At the meeting before the City Council on December 18, 1990, employees of the Building, Engineering and Planning Department reviewed the background and the plans and specifications of "The Fairways Project." The Assistant City Attorney also made comments and recommendations.

19. Employees and consultants of "The Developer" (Fieldstone Company) then put on a slick "dog and pony" demonstration, including, maps, photographs, and a slide presentation in support of the "Fairways Project."

20. That plaintiffs appeared at said meeting along with other interested parties and pursuant to the rules of "The City" were granted five minutes in which to speak as individuals and ten minutes for presentations on behalf of a group. A copy of

the Agenda is attached hereto in support of this allegation as Exhibit "D." That the procedures are designed and applied merely to evoke and record a public response and the process does not guarantee an affected landowner a meaningful predeprivation hearing. There is no opportunity to present a case and, at best, you may identify your points. There is no pretense that you can present evidence in support of your case nor even an opportunity to persuade. The failure of a meaningful notice coupled with this type of hearing is a sham.

21. That the plaintiff on his own behalf and also as the spokesperson for the Alicante Hills Homeowners Association, a California Corporation, voiced his objections to the Planning Department, the Planning Commission, as well as the City Council, to wit: The location of the access to the Project should be moved from Corte de la Vista back to Alicante Road where "The Developer" had originally requested it; that by diverting the traffic from Alicante Road to Corte de la Vista, the City of Carlsbad has increased tenfold the probability that an accident would occur at the "blind spot" which exists when exiting Corte de la Vista on to Alicante Road; that the costs associated with compensating individuals for injuries incurred as a result of approval of the tentative map, with knowledge of such increased risks, will be unfairly born by the taxpayers of Carlsbad; and lastly, that plaintiffs will be denied the use and enjoyment of their property and the property value will decrease substantially due to the significant increase in noise, light, fumes, dust, dirt, and vibrations which will emanate from the traffic generated by the 132 single family homes in and out of the planned unit development gate, the entrance being located below plaintiffs' property on Corte de la Vista, instead of Alicante Road. A copy of the Planning Commission's minutes of October 3, 1990 is attached hereto and incorporated herein by reference as Exhibit "E."

22. Thereafter, both "The Developer" and "The City" were given unlimited time, as they were in making their original presentation, to rebut the objections made by the public, including your plaintiffs. At no time was plaintiff given an opportunity to cross-examine the witnesses who testified in favor

of the plan. Nor was plaintiff allowed time to rebut the evidence which was marshaled in support of the plan.

23. On or about January 8, 1991, the tentative map was approved by the City of Carlsbad. However, the tentative map was subject to a number of conditions. That these conditions involve issues the resolution of which require the exercise of judgment, discretion, and the careful balancing of conflicting interests which is the essence of the "adjudicative" process. In addition, the tentative map still had to comply with the final map requirements contained in Chapter 20.20 of the "City's" Subdivision Ordinance, which also calls for the adjudicative process.

24. This notwithstanding, without further notice or public hearings, the final map was approved by the City Council on or about September 3, 1991. This fact was discovered by plaintiffs on September 6, 1991, upon making inquiry with the Planning Department of "The City" as to the time limitation in which to seek judicial review of the City Council's decision. Plaintiffs were informed that the specific period of time in which to seek judicial review was not within the offhand knowledge of this particular employee (nor did he or the plaintiffs know that the time was to be computed from the approval of the tentative map), but that an investigation would be made and an answer provided as soon as possible. To date, plaintiffs have yet to hear from any employee at the Planning Commission as to the limited time in which to seek judicial review of the City Council's decision. At no time did "The City" advise plaintiffs that the time to appeal is calculated from the date the "tentative" map is approved, but to the contrary, led plaintiffs to believe that the approval of the final map was the final and appealable order.

25. That the plaintiffs believe, and so state the facts to be, that in this case, the approval of the final subdivision map was not a mandatory act, and "The Developer" had no vested right and was subject to all the requirements of the "S.M.A." and "The City's" subdivision ordinance that was in force at the time of the approval of the tentative map, plus the express conditions of the said approval as set forth in plaintiffs' Exhibit "E" are such that they required the use of discretion, and thus this action was

brought within ninety days of the adjudicative hearing and the decision approving the final map.

26. Section 66499.37 of the S.M.A., setting the time limits in which to seek judicial review of a decision of the City Council, clearly does not distinguish between a decision approving a tentative map and one approving a final map. That in this case, the City Council does not have to approve the final map unless it is satisfied with the plan of subdivision. Furthermore, it could act other than to approve the final map. Accordingly, the approval of the final map by the City Council was a decision for the purposes of Section 66499.37. Under these circumstances, "The City" was under a duty to give the plaintiffs notice and an opportunity to be heard but they failed to do either.

27. The dynamics of the relationship between "The City" and "The Developer" is such that even if the law stated that "The City" could not act other than to approve the final map, as a practical matter and as a matter of fact, they could withhold the approval for any reason or no reason at all. This is so because "The Developer" is the single largest owner of vacant real estate in the La Costa area of the City of Carlsbad and has one project after another in which they interface with "The City." Furthermore, unless the demand by "The City" was a clear overreaching or would be too costly for "The Developer" to comply with, they would find time delays to seek injunctions or writs too costly to bear. Accordingly, "The Developer" is effectively under economic compulsion to "cooperate" with "The City." Thus, the City Council can exercise its discretion and disapprove a final map, even though "The Developer" complies with the conditions of the tentative map. The Court should take judicial notice of these facts.

28. As to the hearings leading up to the approval of the tentative map, the plaintiffs admit to having received "notice," but state that the "notice" was fatally defective for the following reasons:

(a) it failed to state that the decision on the tentative map was or could be the final decision on the application, and if

judicial review was desired the objector had only 90 days within which to do so;

(b) it failed to state that the approval of the final map would be made without notice and without a hearing and that it would be, or could be, only a ministerial act and not subject to review;

(c) it failed to state that if plaintiffs did not appeal the decision they may lose valuable property rights by virtue of the doctrines of res judicata and/or collateral estoppel and the statute of limitations.

29. At all times herein mentioned there was in full force and effect an ordinance of "The City" which provides, in substance, that time limits for judicial review of any decision of "The City," made pursuant to Code of Civil Procedure §1094.5, afford certain individuals "actual notice" of any decision affecting their rights. Said notice must state that, "Any petition or paper seeking judicial review must be filed in the appropriate court not later than the ninetieth day following the date on which the decision becomes final;..." (Chapter 1.16 §1.16.010).

30. That "The City" has a clear duty to advise a party to an adjudicatory proceeding of the time limit within which to seek judicial review of the decision in an action under Section 1094.5; all the more so they have a duty to plaintiffs who have substantial and significant property rights at risk by virtue of proceedings under their Subdivision Ordinance. The fact that a hearing leading up to a final decision has the unfortunate and misleading label of "tentative approval" of the map, further exasperates objectors and lulls them into a false sense of security, and "The City" is under an affirmative duty to furnish persons with notice to explain that tentative action may be final and the consequences of that fact, which they failed to do.

31. Neither the hearing nor the notice conform to the standards of the "due process" clause of the Federal or State Constitution. Therefore, the decision is null and void as to plaintiffs and should be set aside as being unconstitutional as applied to plaintiffs in this case.

32. The Subdivision Ordinance of "The City" as well as "S.M.A." is invalid and unenforceable on its face and as

construed and as applied by "The City" as against the plaintiffs. It violates the due process clause and the equal protection clause of the United States Constitution as well as the California Constitution.

33. The hearings hereinabove identified were a sham and a fraud on the plaintiffs. "The City" knew or should have known that the notice and hearing provided was an abuse of authority and discretion. Substantial and significant property interests of the plaintiffs were involved and the notice given was not meaningful and was fatally defective. In fact, the notice given by "The City" was false and misleading by failing to expressly notify plaintiffs of the time limit within which to seek judicial review together with the disastrous consequences of res judicata and/or collateral estoppel and the statute of limitations for any cause of action the plaintiffs have or could have. The hearings did not permit discovery. They limited the individual to five minutes and group spokespersons to ten minutes. In addition, there was no right of cross-examination of witnesses who testified for "The City" or "The Developer." Furthermore, "The City" and "The Developer" were permitted to give their arguments and conclusions without any factual basis and without any time limitation. Lastly, plaintiffs were given no opportunity to rebut the testimony which was presented in support of the plan.

34. The Court is requested to take judicial notice that the City Council had discretion to determine the facts; that a hearing is required by law; that any interested person may appear at such hearing and shall be heard; and that evidence is required to be taken (none of which occurred in this case).

35. The plaintiffs have exhausted their administrative remedies and have no plain and speedy remedy in the ordinary course of the law other than that which this complaint provides.

36. That pursuant to Government Code §1028.2 and/or Code of Civil Procedure §1028.5, the plaintiffs are requesting reasonable attorney's fees and expenses in addition to other ordinary and necessary costs incurred in this case as well as private attorney's general fees.

37. That based upon the above and foregoing, plaintiffs allege that a writ of mandate is necessary to protect the substantial rights of the plaintiffs and each of them and that substantial damages will be suffered by them if the request for the writ is denied. Such damages include the diminution in value and the loss of use and enjoyment of their property and is in excess of $100,000.00.

38. The first notice that the plaintiffs had as to the nature and extent of their damages occurred the first part of August 1991, when "The Developer," through its employees and agents, commenced grading and installing storm sewers on the property in question (P.I.Q.) with trucks, bulldozers, back hoes, earth movers and miscellaneous construction equipment, and used a driveway which is across the street and less than 100 feet west of the named plaintiffs' property, for ingress and egress. (Plaintiffs' Exhibit "A.") This is a continuing nuisance and can be expected throughout construction which is expected to take several years, and thereafter, when vehicles of all descriptions will (and at all hours of the day and night) be coming in and out of the 132 home subdivision.

39. That "The City" knew or should have known (because they led them to believe), that plaintiffs were lulled into believing that they had been given notice of all their rights; that the plaintiffs relied on "The City" to give them a meaningful notice, "The City" misplaced that trust and reliance, and plaintiffs have been damaged thereby. "The City" prevented the issues from being properly raised, and the issues could not have been raised by the plaintiffs, who used reasonable diligence, and therefore "The City" is estopped from asserting the defense of failing to seek judicial review in a timely manner.

40. "The Developer" did not acquire a vested right upon the approval of the tentative map, they did not have a valid building permit nor did they perform substantial work and incur substantial liability in good faith reliance on the approval of the tentative map, and thus "The City" could have and should have held additional adjudicative, discretionary hearings prior to their decision approving the final map subject to notice and an opportunity for plaintiffs to be heard, which they failed to do.

41. The Government Code provides the "The Developer" with a statutory equivalent of a vested right; principal among these are the Development Agreement, §§65864-65869.5, and the Vesting Map Act, §§66498.1 - 66498.9. "The Developer" did not avail itself of this protection.

42. Government Code §66468 provides that the filing for record of the final map shall automatically and finally determine the validity of such map. The final map in this case was not filed until December 20, 1991, as document number 1991-0662811, two full months after plaintiffs' suit was filed.

43. Chapter 4, Article 1 of the "S.M.A." provides the requirements for approval of a subdivision. §66473 provides that a map shall be disapproved for failure to meet the requirements of the "S.M.A." or the local ordinance. The only qualification being that ". . . a final map shall be disapproved only for failure to meet or perform requirements or conditions which were applicable to the subdivision at the time of the approval of the tentative map . . ." The requirements were not met and are not to this day.

44. Further, §66474 provides in part that a map shall be denied if the design or improvement of the proposed subdivision: (a) is not consistent with the general and specific plans of the community, or (b) is likely to cause substantial environmental damage.

45. The facts alleged in this complaint support the allegations of the creation of a nuisance, trespass, and air pollution, thus the approval of a final map, could not be consistent with the general and specific plans of the community and is and will continue to cause substantial environmental damage.

46. That the plaintiffs received no notice and no opportunity to a hearing of the proceedings leading up to the approval of the final map which was, or ought to have been, an adjudicative, discretionary hearing.

47. The plaintiffs filed their complaint within forty-five days from the approval of the final map (and within two and a half months from the commencement of the site preparation) and are entitled to judicial review.

48. As hereinabove alleged, Title 1, §1.16.010 of the City of Carlsbad Municipal Code provides for time limits for judicial review. It provides in substance that upon making a final decision, "The City" shall provide notice to the party stating the time within which judicial review must be sought as part of the decision. No such notice was given by "The City" to these plaintiffs. Because of the special relationship between "The City" and the plaintiffs as citizens, they had a duty to give plaintiffs a proper notice and a meaningful hearing and they breached that duty.

49. §1.16.020 of said Title, though not applicable to these plaintiffs, bars court action to " . . . attack, review, set aside, void, annul or seek damages or compensation for any city decision..." (emphasis added). Government Code §66499.37 which bars court action does not bar actions which only "seek damages or compensation," and demonstrates how easy it is to bar attacks and as well as compensatory damages, and "The City" used this device and is charged with actual notice of the distinction between Government Code §66499.37 which does not bar actions for compensatory damages.

50. That the plaintiffs allege upon information and belief and based thereon state the facts to be that they have sought judicial review within 90 days of September 3, 1991, the date of approval of the final map and that such decision was the final and appealable order.

51. That plaintiffs allege upon information and belief and based thereon state the facts to be that: They were not parties nor in privity with the parties in the proceeding below; §66499.37 of "S.M.A." is not applicable to an action for compensation or damages.

52. Government Code §66499.37 only applies to an action to attack the decision of the public agency involved. Count I of this complaint only seeks compensation because of the damages and/or taking caused by the decision to divert the traffic.

53. In this count, plaintiffs do not seek a writ of mandate unless the court finds that the approval of the final map was the final and appealable order. In the plaintiffs' claim of the denial of both procedural and substantive due process and their civil

rights, the writ of mandate cause of action is used as a judicial vehicle so the Court can examine the proceedings leading to the decisions approving the tentative and final maps. It does not challenge the decisions (which under the law do not exist), but only challenges the acts and omissions which were antecedent or retroactive to the "decisions."

54. That in the event that the court finds that the complaint was filed in a timely manner, the plaintiffs allege and state the facts to be that the decision to divert traffic based on public safety, did not advance the legitimate governmental interest because the fact is that it created a dangerous condition on public property and was counter-productive and did not substantially advance a legitimate governmental interest.

55. The plaintiffs believe and state the facts to be that "The City's" decision was improvident and flawed, and there is a greater danger of injuries and fatalities by increasing the traffic that exits from Corte de la Vista because it is a "blind" exit to northbound traffic and constitutes a negligent design of traffic management and creates a dangerous condition on public property.

56. That notwithstanding that "The City" had a common law duty, a state statutory duty, a federal statutory duty (Federal Civil Rights Act, 42 U.S.C. §1983), and a constitutional duty also, both state and federal, to afford plaintiffs procedural and substantive due process and equal protection, they failed and neglected to provide the plaintiffs the necessary protection they were entitled to and as a consequence and proximate cause thereof, plaintiffs have been damaged as herein alleged. The denial of their civil rights has resulted in the denial of their property rights which is the measure of damages plaintiffs seek.

57. "The City," by diverting the traffic for the "Fairway Project" from Alicante Road to Corte de la Vista, violated §66474 of the "S.M.A." which provides that a map shall be denied approval if the design or improvement of the proposed subdivision: (a) is not consistent with the general and specific plans of the community, or (b) is likely to cause substantial environmental damage.

58. §66474 of the "S.M.A." was in full force and effect at the time the tentative map was approved and was applicable then as well as at the time the final map was approved. By denying the plaintiffs proper notice and a meaningful hearing to the proceeding leading up to the approval of the tentative map, and no notice or hearing at all as to the approval of the final map, "The City" breached its duty to the plaintiffs and is responsible to the plaintiffs for their damages which were proximately caused by their aforesaid acts and omissions.

59. That as a direct and necessary result of the official governmental action of diverting the traffic to this 132 home development from Alicante Road to Corte de la Vista with the only entrance located across the street from the plaintiffs' home, the aforesaid noise, dirt, odor, air pollution, flashing headlights and vibrations are, and will continue to cause, a substantial interference with the use and enjoyment by plaintiffs of plaintiffs' homes, the loss of reasonable investment-backed expectations, and a diminution in its primary use and value inasmuch as the volume of traffic will increase more than tenfold to approximately 1500 vehicular sorties a day, all focused across the street from plaintiffs' residence.

60. As a direct result and as a proximate consequence of the dust, dirt, debris, noxious odors, flashing lights and noise, the plaintiffs have been and will continue to be peculiarly and substantially damaged. That "The City," by diverting the traffic to the "Fairways Project" across the street from the plaintiffs' homes, has caused an invasion and appropriation of their valuable property rights and their investment-backed expectations, which has rendered their property untenantable to the plaintiffs, being the essence of why they purchased the property for their residence and paid a premium for its location and view and constitutes a loss of its primary use and value and thus is a compensable taking under Article I, Section 19 of the California Constitution, as well as the Fifth and Fourteenth Amendment of the federal Constitution.

61. That based upon the factual allegations herein, the plaintiffs state the facts to be and allege as follows:

(a) That the nuisance-trespass type activity that results from the traffic generated has caused a diminution in the value of the plaintiffs' property and has substantially interfered with their use and enjoyment of their home by imposing on them a direct, peculiar and substantial burden, and as such, they are entitled to just compensation as a result of the taking and/or damaging of their property;

(b) That the air pollution caused by the traffic is effective physical appropriation, occupation or interference of a permanent nature by contaminating the air over their property, with toxic and non-toxic gaseous solids and/or liquids, and constitutes a compensable taking or damage and that this is true whether the diversion of traffic achieved an important public benefit or had only a minimal economic impact on the plaintiffs;

(c) That even if the effects of the diversion of traffic to across from plaintiffs' property was not a possessory type of activity as hereinabove alleged and only constitutes a non-possessory type interference, the extent to which "The City's" decision has damaged or destroyed the plaintiffs' distinct investment-backed expectations, as hereinabove alleged, are compensable, and the plaintiffs are entitled to just compensation.

(d) That the view and the prevailing ocean breeze were not the primary reasons why the plaintiffs purchased their home and improved the terrace at an additional cost of $50,000.00. They were the only reasons! The view and the breeze is still present, but because of the nuisance, trespass and air pollution described herein, the plaintiffs have been denied use of these features. They have been denied the use of their terrace because of the dirt, noise and odors; and that although the view can be enjoyed from indoors, the house cannot be ventilated and cooled through open windows and doors by the ocean breeze because of the same dirt, noise and odors more fully described elsewhere herein, which make opening the doors and windows prohibitive;

(e) The plaintiffs purchased their home to enjoy the out-of-doors living and comfortable indoor living without air-

conditioning, and both features have been substantially and significantly damaged and/or destroyed by the defendants and each of them as herein alleged and a commensurate diminution and/or destruction in value;

(f) The plaintiffs have incorporated a group of photographs into their group Exhibit B1-20 which demonstrates in a tangible and concrete manner that what has been alleged as the reason for their purchase and subsequent improvements was not an after-thought but was a distinct and reasonable investment-backed expectation.

62. That notwithstanding that no claim is required to be filed against "The City" by the plaintiffs in order to maintain their action (Government Code §905.1), the plaintiffs did on the 26th of September, 1991, deliver to "The City" a copy of a first draft of a complaint, which included causes of action for writ of mandate, inverse condemnation, declaratory relief to determine the validity of the ordinance and statute in question, negligence and nuisance.

63. As a result of the above-described damages to the named plaintiffs' property, they have been damaged in excess of one hundred thousand ($100,000.00) dollars, and by this reference plaintiffs hereby incorporate the specific allegations of damages in this complaint set forth.

64. As a direct and proximate cause of "The City's" diverting the traffic from Alicante Road, the pattern and volume of traffic on Corte de la Vista has resulted in the creation of the nuisance and air pollution herein alleged.

65. Plaintiffs have received no compensation for their damages, nor has "The City" instituted eminent domain proceedings. This cause is in the alternative and in lieu of plaintiffs' first cause of action for inverse condemnation. This action will only be pursued if plaintiffs are denied recovery for their inverse condemnation cause by a final order and after the time to appeal has expired or during the time the appeal is pending.

66. "The City's" decision to divert traffic as aforesaid, without paying to the plaintiffs the just compensation for the damage is in violation of plaintiffs' due process rights, equal

protection rights, proportionality rights, and liberty and privacy rights, contained in both the state and federal Constitutions; both as applied and on its face.

67. At all times herein mentioned there was in full force and effect the federal Civil Rights Act of 1871 which permits an individual to maintain a cause of action against a person acting under color of state law who violates the individual's constitutional or other federally protected rights. Except for a portion of the statute that applies to the District of Columbia, the full text of 42 USC §1983 reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

68. That "The City's" acts and omissions giving rise to this cause of action was as a result of their City Council and its Planning Commission as herein specifically alleged. The detailed allegations support the fact that "The City" engaged in affirmative wrongdoing which resulted in denying the plaintiffs their rights, privileges or immunities secured by the Constitution. The City Council is "The City's" final authority and sets policy, as well as usage and custom. "The City" was carrying out governmental policy and acting under the "S.M.A." as well as its subdivision ordinance and accordingly was acting under color of state law.

69. "The City" failed and neglected to give the plaintiffs a meaningful notice of the hearing relating to the proceeding to approve the tentative map. "The City" gave no notice at all for the hearing relating to the proceeding to approve the final map and this notwithstanding that the hearing was or should have

been adjudicatory in nature. Facts to support this allegation are alleged herein and incorporated by reference.

70. That at the hearing by the Planning Commission on October 3, 1990 generally described hereinabove, the plaintiff Thomas A. Mass was cut off from speaking in less than half the time permitted. Upon protest, the chairperson permitted him to continue for only a few more minutes and summarily refused to grant him the time permitted, cut the sound from his microphone and permitted "The City's" and "The Developer's" employees to answer a few of the charges that he was able to present. The employees as aforesaid were permitted unlimited time to present their argument, the plaintiffs were denied the right to cross-examine them or even reply to them. The full time provided for under "The City's" rules is grossly inadequate for a fair trial and even this time was arbitrarily emasculated and constitutes an abuse of discretion.

71. One of the Commissioners, in rejecting the plaintiffs' objections, stated in substance as follows: As long as Mr. Mass believes that "The City" will be subjected to lawsuits for compensatory damages it is reason enough to rely on "The City's" employees' recommendations.

72. The hearing of the City Council on December 18, 1990 which is more fully described elsewhere herein and by reference incorporated herein, was not a fair predeprivation hearing. The procedures were designed and applied merely to evoke and record a public response and did not provide the plaintiffs a fair and meaningful predeprivation hearing and violated the plaintiff's property rights as well as their civil rights.

73. That the plaintiffs believe and state the facts to be that the procedures followed in carrying out "The City's" duty under state law and pursuant to color of law were not an isolated incident but were pursuant to long usage and custom and constitute an unconstitutional municipal policy.

74. The City Council has the final authority and makes the final decision and sets policy for "The City" and cannot be reviewed or overruled by anyone in the City government as an entity. The only review is by judicial review in a writ of mandate proceeding.

75. The policy and/or custom of "The City" was the cause-in-fact of plaintiffs being deprived of their constitutional rights to meaningful notice and a fair hearing. But for the fact that "The City" failed to provide to the plaintiffs a meaningful notice or a fair hearing they would not have been damaged.

76. That as a proximate result of The City's" acts and omissions as aforesaid the plaintiffs were denied a constitutional meaningful notice and a fair hearing and as a direct result of such deprivations of their rights the plaintiffs have been denied the use and enjoyment of their property and a substantial diminution of the value of their property. The above allegations are supported by detailed allegations set forth hereinabove.

77. The nature and extent of the plaintiffs' damages as a result of being denied their constitutional rights was apparent and foreseeable to any reasonable person. "The City" should have been aware of such a common and reasonable chain of events. Further, "The City" was expressly advised by the plaintiffs of their potential damages by so advising the Planning Department, the Planning Commission, and the City Council prior to their hearings and/or decision.

78. Plaintiffs have incurred and will incur attorneys', appraisal, environmental experts and engineering fees because of this proceeding, in amounts that cannot yet be ascertained, which are recoverable in their action under the provisions of Section 1036 of the Code of Civil Procedure.

79. An actual controversy has arisen and now exists between the plaintiffs and the defendants as to the legal consequences resulting from the facts that have and will occur as hereinabove alleged.

80. Plaintiffs desire a judicial determination of their rights and duties, and a declaration that they may pursue their remedies for damages.

81. A judicial declaration is necessary and appropriate in order that the parties may take appropriate steps to mitigate their damages; and will also serve considerations of judicial economy.

WHEREFORE, plaintiffs pray judgment as follows:

A. For a writ of mandate directing "The City" to set aside its decision of January 8, 1991 approving the tentative map, and its decision of September 3, 1991 approving the final map, as being non-existent under the law and ab initio null and void because there has been a prejudicial abuse of discretion and the denial of a fair hearing pursuant to meaningful notice, and the proceedings were without, or in excess of, their jurisdiction over the plaintiffs, because they were not given a meaningful notice or a fair hearing in the predeprivation proceedings, or in the alternative;

For a money judgment based upon the difference in value of the plaintiffs' property between its fair market value prior to the acts complained of herein and the fair market value after the acts complained of herein as well as the loss of the monetary value that plaintiffs suffered from the loss of their use and enjoyment of their property.

B. That in the event the Court finds that there was no deprivation of the plaintiffs' constitutional rights, but it also finds that the proceeding leading to "The City's" decision to approve the final map was "adjudicatory," then and only then will plaintiffs seek to challenge the propriety of the decision pursuant to the traditional remedy provided by the writ of mandate, and accordingly hereby pray for such relief as well as such other and further relief as may be deemed necessary and proper.

C. Declaring the respective rights and duties of the parties; and declaring that the statutes, ordinances and proceedings are invalid and void on their face, or as applied to plaintiffs, or are not applicable to plaintiffs if valid.

D. For such other relief which plaintiffs are entitled to by the facts alleged in their complaint, whether injunctive, in declaratory relief or otherwise, as the Court deems most appropriate.

E. For punitive damages if individual defendants are joined, in an amount appropriate to punish them for their wrongful conduct and set an example for others.

F. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded.

G. For costs of suit herein incurred and for reasonable litigation expenses.

H. For such other and further relief as the Court may deem proper.

Dated: August 6, 1992

THOMAS A. MASS
Plaintiff In Pro Per

JANET A. MASS
Plaintiff In Pro Per

DEMAND FOR JURY TRIAL

Plaintiffs in the above-entitled action request a trial by jury as provided by Amendment VII of the United States Constitution and the laws of California.

VERIFICATION

I, THOMAS A. MASS, am one of the plaintiffs in the above-entitled action. I have read the foregoing THIRD AMENDED COMPLAINT FOR PLAINTIFFS' THIRD CAUSE OF ACTION FOR A WRIT OF MANDATE IN THE ALTERNATIVE, and know the contents thereof. The same is true of my own knowledge except as to those matters which are therein alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Carlsbad, California, this 6th day of August, 1992.

THOMAS A. MASS
2851 Torry Court
Carlsbad, CA 92009
Phone: (619) 931-0100
FAX: (619) 438-7850

PROOF OF SERVICE OMITTED IN PRINTING

From the Desk of
THOMAS A. MASS

7 August 1991

The Villages of La Costa
P.O. Box 9000-266
Carlsbad, CA 92009

Attention: Mrs. Bradstreet

Re: Fieldstone Company's Fairways Project

Dear Neighbor:

I have been meaning to go on record with you as to my objections to your project, The Fairways. This a.m. at 4:30 your grading contractor started unloading its heavy duty equipment and it sounded like "operation Fairway storm." This "serenade" under our bedroom window provided me with the motivation to get this letter off without delay.

As you know, Courte de La Vista "T's" into Alicante Road, and this exit is blind to traffic coming up the hill. Because of the tenforld increase in traffic, it's reasonable to expect an accident and all the tragic things that will result. Therefore, I urge you not to plac eyour entrance on Courte de La Vista, but rather, on Alicante Road.

The entrance of Courte de La Vista also adversely affects the residential nature of the street we front on; we can expect noise, fumes, flashing headlights in our homes, etc., which were designed to capitalize on the tranquil view and fresh air. You have made a residential low use road into a high traffic artery.

EXHIBIT A

You have shown no sensitivity for the safety or aesthetics of our community. In mitigation, you should minimize these assaults on our environment by such steps as" low one-story homes at the high entryway; install glass walls on the homes that front on Courte de La Vista between Alicante Road and the entryway; speed and quiet zone signs; and appropriate landscaping.

Your future conduct will show your intentions.

Very truly yours,
THOMAS A. MASS

TAM/ds

NOTICE OF PUBLIC HEARING
CT 90-23/PUD 90-23/HDP 90-29

NOTICE IS HEREBY GIVEN that the City Council of the City of Carlsbad will hold a public hearing at the City Council Chambers, 1200 Carlsbad Village Drive (formerly Elm Avenue), Carlsbad, California, at 6:00 P.M., on Tuesday, December 18, 1990, to consider an application for a tentative map, planned unit development and hillside development permit for 132 single family detached homes on 41.09 acres of land in the RDM zone and Local Facilities Mnagement Zone 6 on property generally located south of Corte de la Vista, east of Alicante Road and north of the La Costa Gold Course and more particularly described as:

> Parcel 2 of Parcel Map No. 11722, in the City of Carlsbad, County of San Diego, according to map thereof filed in e office of the County Recorder of San Diego County on October 10, 1981 as file no. 81-322184 of Official Records.

If you have any questions regarding this matter, please call the Planning Department at 438-1161.

If you challenge the Tentative Tract Map/Planned Unit Development/Hillside Development Permit in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice or in written correspondence delivered to the City of Carlsbad City Clerk's Office at or prior to the public hearing.

APPLICANT: Fieldstone Company
PUBLISH: December 6, 1990
CARLSBAD CITY COUNCIL

MAP OMITTED IN PRINTING

EXHIBIT C

CITY OF CARLSBAD
CITY COUNCIL MEETING
CARLSBAD MUNICIPAL WATER DISTRICT MEETING
HOUSING AND REDEVELOPMENT COMMISSION MEETING

AGENDA
DECEMBER 18, 1990

NOTICE TO THE PUBLIC

1. Citizens may have an item listed on the agenda by sumbitting a letter to the City Manager ten (10) days prior to the meeting.

2. It is Council's policy to adjourn meetings no later than 10:00 P.M.

3. Meetings are divided into categories shown below.

4. When you are called to speak, please come forward and state your name and address.

CONSENT CALENDAR: If you desire to talk about an item on the Consent Calendar, a written **"Request to Speak"** form must be filed with the City Clerk prior to the time the Consent Calendar is called. The items listed under Consent Calendar are considered routine and will be enacted by one motion as listed. There will be no separate discussion on these items prior to the bote, unless an item is removed.

PUBLIC COMMENT: If you desire to speak about an item not listed on the agenda, a pink **"Time Reservation Request"** form should be filed with the City Clerk. A total of 15 minutes is provided for the Public Comment portion of the Agenda. Speakers are limited to three (3) minutes each.

EXHIBIT D

In conformance with the Brown Act, no action can occur on items presented during Public Comment.

PUBLIC HEARINGS: It is not necessary to file a request to speak on items listed on this agend as Public Hearings.

ALL OTHER CATEGORIES: For all other agenda items a **"Request to Speak"** form must be filed with the City Clerk before the item is announced. There is a five (5) minute time limit for individual speakers.

MINUTES

Meeting of:	PLANNING COMMISSION
Time of Meeting:	6:00 p.m.
Date of Meeting:	October 3, 1990
Place of Meeting:	City Council Chambers

MINUTES OMITTED IN PRINTING, EXCEPT PAGE 2, PARAGRAPH 3:

> "The project is proposed as a gated community. The gate design is single access off Corte de la Vista and it provides a turnaround area at the entrance. The location of the single access was dictated by staff. The original proposal came in with an access off Alicante Road; however, for traffic safety purposes, staff requested that the entrance be moved to Corte de la Vista."

EXHIBIT E

FILED
Clerk of the Superior Court
Aug 31 1992
Vista Branch

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

THOMAS A. MASS and JANET A. MASS, Plaintiffs

v.

CITY OF CARLSBAD, a Municipal Corporation; FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP, a California Limited Partnership, Defendants

Case No. N53303

AMENDED AND SUPPLEMENTAL COMPLAINT FOR PLAINTIFFS' CAUSE OF ACTIONS BASED ON THE DEPRIVATION OF THEIR RIGHTS SECURED BY THE UNITED STATES CONSTITUTION, REQUESTING MONEY DAMAGES, DECLARATORY RELIEF AND EQUITABLE RELIEF INCLUDIGN AN INJUNCTION. [42 U.S.C. §§1983, 1985, 1986, 1988]

This Amended and Supplemental Complaint is being filed pursuant to §472 of the Code of Civil Procedure of the State of California. The Court in its telephonic temporary ruling on July 27, 1992 sustained defendants' demurrer to plaintiffs' second amended complaint in its entirety. Plaintiffs were not given leave to amend their first or second causes of action but the Court did grant to the plaintiffs leave to amend their third cause of action. On August 6, 1992 plaintiffs filed their Third Amended Complaint as to their third cause of action.

FOURTH CAUSE OF ACTION

Deprivation of Rights Under Color of State Law
[42 U.S.C. §§1983, 1985, 1986, 1988]
(Plaintiffs vs. "The City" Defendants)

82. Plaintiffs incorporate paragraphs 1 through 81 both inclusive of their third cause of action in their third amended complaint as though fully set out here, including the exhibits thereto attached.

83. As herein stated, this action is based on the deprivation of plaintiffs' rights under color of state law brought pursuant to the Civil Rights Act of 1871, Title 42 United States Code §§1983, 1985, 1986, 1988 (1988 Civil Rights Act), for remedies that the court may seem just, for "The City's" deprivation of plaintiffs' civil and property rights.

84. Plaintiffs allege that by virtue of their acts and omissions hereinabove set out in detail, "The City," under color of state law, deprived the plaintiffs of their guaranteed and protected rights under the Fifth Amendment of the United States Constitution by taking their property for public use without just compensation.

85. That by virtue of the negligent acts and omissions of "The Developer" as herein specifically alleged, during the grading and utilities placement work on the "Fairways Project" which has been in continuous operation for over thirteen months, the pollution caused by the negligent manner in which the site preparation was performed resulted in the plaintiffs losing the value of the use and enjoyment of their property (see plaintiffs' Exhibit F).

86. That at all times during the site preparation phase of construction, "The Developer," who was subject to the direction and approval of "The City," performed their construction in a manner which was negligent as aforesaid, and "The City" had full power and authority to stop the job if not performed in accordance with the plan or performed in a negligent manner. "The City's" failure to exercise its authority, as under the circumstances it was under a duty to do, was an abuse of

governmental powers resulting in permanent loss to the plaintiffs of their protected property rights as aforesaid.

87. The plaintiffs' property rights to the free use and enjoyment of their property and their right to exclude has been violated by "The City's" acts and omissions as aforesaid. This abuse of power and deliberate indifference to the damages the plaintiffs were sustaining is a deprivation of plaintiffs' constitutional rights as aforesaid, and is particularly egregious in light of the fact that "The City" knew the nature and extent of the injuries that were occurring to plaintiffs.

88. The special relationship that exists between "The City" and the citizens in general and particularly the plaintiffs who had given actual notice to "The City" of their claim, places an additional duty on "The City," which they breached, resulting in the deprivation as aforesaid.

89. This failure of "The City" to discharge its duty was an abuse of governmental powers, would shock the conscience of an ordinary person, and thus constitutes an unlawful taking, denial of equal protection, and procedural denial of due process. "The City" has a constitutional duty to protect the plaintiffs from such a calamitous result and deprivation as aforesaid.

90. That upon completion of the "Fairways Project," which can reasonably be expected to take two or more years from the completion of its site preparation which is still in progress, and based on "The City's" Interim Traffic Impact Fee for Southeastern Area (La Costa) Ordinance, 18.42.000 et seq, the "Fairways Project" alone will result in generating over 1,300 "trips" each weekday.

91. The Court will take judicial notice that there are 1,440 minutes in each one day period; and that one motor vehicle every minute entering and exiting a gate which is directly across the street from plaintiffs' home, together with braking and accelerating, will cause air and noise pollution to the plaintiffs and their property.

92. That as a direct and proximate cause of the dust, dirt, debris, noxious odors, flashing lights at night and street noise,

the plaintiffs have been and will continue to be peculiarly and substantially damaged.

93. That the location of the access to the "Fairways Project" across the street from the plaintiffs' homes has caused a destruction of their valuable property rights and rendered their property untenantable. The unique property rights formerly enjoyed by the plaintiffs was the essence of the reason they purchased the property and paid a premium for its location and view.

94. The view is still there but cannot be enjoyed because of the dirt, noise and air pollution, as aforesaid.

95. The essence of the actionable air pollution hereinabove described is that it damages, if not destroys, the plaintiffs' personal enjoyment of their terrace. It also has the effect of lessening the value of the property and may affect the health of the plaintiffs. It also requires that doors and windows be kept closed at all times, and will thereby force the plaintiffs to install air conditioning which they cannot tolerate.

96. "The City" allowed "The Developer" to continue emission of fugitive dust from its operation and use of unpaved roads, open storage files, demolition and disturbed surface area, so that the presence of such dust remains visible in the atmosphere above the plaintiffs' property and deposits large amounts of visible, particulate matter on the plaintiffs and their property, and that has continued for over a year.

97. That upon completion of construction we can reasonably expect that the "Fairways Project" will generate one motor vehicle every minute every day and night. This extraordinary and unexpected volume in traffic will all be focused across the street from the plaintiffs' home and will result in the air pollution hereinabove described and increase the ozone, exhaust contaminants, carbon monoxide and fine particles that will be injurious to plaintiffs and their property as herein more fully alleged, all as a direct and proximate result of "The City's" abuse of its governmental power as aforesaid.

98. That as a direct and proximate result of "The City's" aforesaid acts and omissions all done under color of state law, the plaintiffs were deprived of their civil rights and property

rights under the Constitution and in violation of the Federal Civil Rights Act inasmuch as their property was taken for public use and without just compensation.

99. But for "The City's" decision to divert the traffic from Alicante Road to the one point of access to the "Fairways Project" on Corte de la Vista, the permanent taking of plaintiffs property would not have occurred. "The City's" decision is in excess of its authority and flawed in its execution; thus null and void and should be set aside. (Vehicle Code §21 et seq.)

100. If the court required that the gate be relocated to its original location and the Corte de la Vista access be shut down, plaintiffs' compensatory damages would be limited to the taking resulting from the manner in which construction has been performed to date.

101. That on July 27, 1992, the court entered its tentative telephonic ruling which provided in part the following:

> "DEFENDANTS' DEMURRER TO PLAINTIFFS' SECOND AMENDED COMPLAINT SUSTAINED IN ITS ENTIRETY, PER CCP SECTION 430.10.
>
> 1. PLAINTIFFS' FIRST CAUSE OF ACTION, FOR INVERSE CONDEMNATION, IS DEFICIENT IN THAT PLAINTIFFS HAVE FAILED TO PLEAD FACTS SHOWING THE LOSS OF THE PRIMARY USE AND VALUE OF THEIR PROPERTY. A TEMPORARY INJURY RESULTING FROM ACTUAL CONSTRUCTION OF PUBLIC IMPROVEMENTS IS GENERALLY NONCOMPENSABLE. People ex rel. Department of Public Works v. Ayon (1960) 54 Cal.2d 217, 228. PLAINTIFFS HAVE FAILED TO PLEAD FACTS GIVING RISE TO A CLAIM FOR INVERSE CONDEMNATION.
>
> FURTHERMORE, PLAINTIFFS' CHALLENGE TO THE VALIDITY OF THE RELEVANT

TENTATIVE AND FINAL MAPS IS BARRED BY THE 90 DAY LIMITATION PERIOD SET FORTH IN GOVT. CODE 66499.37.

THE DEMURRER TO THE FIRST CAUSE OF ACTION IS SUSTAINED WITHOUT LEAVE TO AMEND."

102. That the law of this case, albeit improvident, is such that plaintiffs as of August 7, 1992, the day the court confirmed its tentative ruling, do not have an adequate state court remedy for a post deprivation hearing or an action for inverse condemnation, to provide them compensation for Fifth Amendment taking. That plaintiffs' federal civil rights claim first became ripe on August 7, 1992, and is not barred by any state immunities or claims-presentation requirements.

103. That the allegations herein support the fact that "The Developer" was under a license by "The City" approving the subdivision map and granting the necessary permits to develop the "Fairways Project" pursuant to an extensive system of governmental regulations based upon state laws and "The City's ordinances, policy and custom.

104. That "The Developer" in developing the site operated under the color of law because of the close nexus with "The City," and further, because the nature of the functions performed by them are functions that are traditionally performed by governments. "The Developer" installed the utilities, including water, storm sewers, sanitary sewers, gas and electricity. They also constructed retaining walls, roads and access facilities, all in accordance with plans and specifications approved by "The City" and supervised by them.

105. "The City's" liability is not being based upon plaintiffs' allegations that they caused "The Developer" to perform in the manner it did, but upon its failure to prevent the alleged infringement of federal rights that were fairly attributable to them.

106. That "The City's" acts and omissions of authorizing, compelling, or sanctioning the manner in which "The

Developer" performed the site preparation were the direct and proximate cause of the deprivation of plaintiffs' rights as aforesaid.

107. That the plaintiffs, based upon information and belief, state that there exists between the defendants written agreements, among which there exists an indemnification agreement wherein "The City" has insulated itself from the wrongful acts and omissions of "The Developer." That the plaintiffs further believe and so state the facts that notwithstanding the existence of an indemnity agreement or not the defendants are liable jointly and severally to the plaintiffs. That §1985 of said Civil Rights Act provides in part as follows:

> "Conspiracy to interfere with Civil rights.
>
> ". . .
>
> "Obstructing justice; intimidating party, . . . ¶(2) . . . if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;
>
> ". . .
>
> "Depriving persons of rights or privileges. ¶(3) If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such

> conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

108. That §1986 of said Civil Rights Act provides in part as \follows:

> "Action for neglect to prevent. ¶ Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; . . .

109. That plaintiffs are informed and believe and further based on the conduct of "The City" and "The Developer" herein alleged in detail and thereon allege that these defendants have obstructed justice and intimidated the plaintiffs with intent to deny them their rights, privileges and immunities, as herein alleged, of their property, and from lawfully enforcing or attempting to enforce said rights.

110. That plaintiffs are informed and believe and further based on the conduct of "The City" and "The Developer" herein alleged in detail and thereon allege that these defendants have obstructed and continue to deprive the plaintiffs of their rights as aforesaid by conspiring for the purpose of depriving them of their constitutional rights and the Civil Rights Act, and have taken their property and denied them substantive and procedural due process as well as equal protection, to their substantial and significant damages as herein alleged.

111. That plaintiffs are informed and believe and further based on the conduct of "The City" and "The Developer" herein alleged in detail and thereon allege that these defendants have obstructed, also, by virtue of their conduct in this case by their pleadings and their memorandums of points and authorities, demonstrated their obstruction of justice and intimidation of the plaintiffs as aforesaid, and that said conduct implicitly establishes the essential elements of a cause of action based on §§1875 and 1986 of the federal Civil Rights Act.

112. That the defendants and each of them made explicit what was implicit when their attorney on August 7, 1992, after leaving the courtroom and in the corridors of the courthouse on the way to the exit stated to plaintiff that if he continued to file actions based on the facts contained in plaintiffs' First and Second causes of action he would seek sanctions against them.

113. That the threat thus made was in anger and made with the intent to intimidate these plaintiffs and continued a course of conduct that has deprived these plaintiffs of their constitutional rights as alleged and with full knowledge of the wrongs conspired to be done under the United States Constitution and the Civil Rights Act.

114. That all of the wrongful acts of these defendants were such that they and each of them knew that such acts could have been prevented by their reasonable diligence, and were expressly communicated by plaintiff to them years ago but they have and continue to act to prevent the perpetration of said wrongful acts.

115. That because of the age and lifestyle of these plaintiffs injunctive relief is the only meaningful remedy because money damages are inadequate and would only increase their net worth which would benefit their heirs but not them. Not only do the plaintiffs need injunctive relief, they need it now before the case drags out to exceed their life expectancy.

116. "The City" acting under color of law has deprived plaintiffs a property interest protected by the Fifth Amendment and by Section 1 of the Fourteenth Amendment of the United States Constitution as herein alleged in particularity.

117. "The City" acting under color of law deprived plaintiffs of their procedural and substantive due process protected by Section 1 of the Fourteenth Amendment of the United States Constitution as herein alleged in particularity.

118. "The City" acting under color of law has deprived plaintiffs of their right to equal protection of the law protected by Section 1 of the United States Constitution inasmuch as its ordinance relating to time limits for judicial review provides in substance in Section 1.16.010 that employees and applicants for a license shall be given written notice of any decision made as a result of an adjudicatory administrative hearing and the time within which judicial review must be sought. The Court is requested to take judicial notice of this ordinance. That the plaintiffs as contiguous property owners were invited to a hearing designed and applied merely to evoke and record a public response. The plaintiffs had no notice or any knowledge that this was a predeprivation proceeding where they are bound by the decision, and without a fair hearing, and without any notice of their rights to judicial review, as herein more fully alleged.

119. That plaintiffs as contiguous property owners entitled to notice of an application relating to a proposed subdivision have substantial and significant protected property interests and they were not given the equal protection of others with less at risk; in fact they not only were not given any protection, they were fraudulently misled and deceived by what was done and perfected by a conspiracy of silence, all of which is herein alleged in particularity.

120. The plaintiffs in anticipation of the defendants' defense of a bar to their cause of action based upon the federal Civil Rights Act, set forth facts that are in avoidance, to wit: the determination of the applicable statute of limitations rests upon the nature of plaintiffs' rights as herein alleged, e.g., the three year statute in connection with an action created by statute, or for trespass to real property, or an action to recover for physical damages to private property under §19 of Article I of the California Constitution.

121. The plaintiffs, based upon information and belief, state that their cause of action based upon the federal Civil Rights Act was not an available remedy and no suit could be maintained upon it until it accrued, which did not happen until the 27th day of July 1992.

122. That the plaintiffs, based upon information and belief, state that from any other prior date until said July 27, 1992, they were under a legal inhibition to sue because their cause of action was not ripe and thus under a constructive stay until their cause became ripe, to wit: July 27, 1992.

123. The defendants first had notice of plaintiffs' objections to "The City's" traffic diversion plan as herein alleged in late spring and early summer of 1990; again and orally before "The City's" Planning Commission on October 3, 1990; and before "The City's" City Council on December 18, 1990. The first formal written notice was given to these defendants on September 26, 1991, by delivery to them of a first draft of a complaint against both of them by the plaintiffs for a writ of mandate, inverse condemnation, nuisance, negligence, and violation of constitutional rights growing out of the "S.M.A." and "The City's" subdivision ordinance relating to the misleading notice and unfair hearing.

124. That the plaintiffs' cause of action based upon the Civil Rights Act as aforesaid rests basically on the same facts as alleged in their prior notice, objections and complaints, and the defendants have not been prejudiced in gathering evidence to defend against this claim or in any other way.

125. That the plaintiffs could not have pursued this cause of action any earlier then they did and the record in this cause supports plaintiffs' statement that they acted reasonably and in good faith in filing this new cause of action promptly upon becoming ripe.

126. That the plaintiffs, based upon information and belief, allege that §66499.37 of the Government Code has no application to any cause of action based on a request for money damages to non-parties nor in privity with the parties, and the decision was made pursuant to unconstitutional notice and

hearings, and based upon the factual allegations hereinabove stated, said §66499.37 cannot be a bar to these plaintiffs.

127. That the plaintiffs, based upon information and belief, state as to all other causes of action alleged in this, their "Fourth Cause of Action" upon which their civil rights cause of action rests upon, that they have good and valid facts
to support the avoidance of a defense based on the statute of limitations.

128. That the plaintiffs, based upon information and belief, state that the factual statements herein alleged support the fact that the defendants and each of them concealed material facts by neglecting to notify these plaintiffs that the decision approving the tentative map was a final order and that unless plaintiffs sought judicial review of that decision they would be deprived of their property. Further, they neglected to notify these plaintiffs that the time within which to seek judicial review was only ninety days and what the results of failing to file within the statutory time limit would be.

129. The plaintiffs allege that the defendants and each of them knew that by virtue of the plaintiffs' objections and their tenacity that they intended to pursue this matter by exhausting all legal remedies available. That the defendants and each of them knew or should have known that plaintiffs were relying on defendants to be notified as to the requirements to perfect their pursuit. That neither of the defendants at any time notified the plaintiffs that the decision approving the tentative map was a final order or that there would be no further hearing in connection with the final approval of the map until after plaintiffs found out with due diligence.

130. That both of the defendants were aware of the rules, knew of the plaintiffs' interest in pursuing their rights, and knew that plaintiffs were relying on them to be notified as aforesaid and failed and neglected to properly notify plaintiffs. That based upon the facts and circumstances as herein alleged these defendants and each of them had an affirmative duty to disclose to plaintiffs their rights and requirements, that these were material facts, and their failure to so disclose was a fraudulent concealment, which plaintiffs relied upon and to their detriment.

131. That the relationship between the plaintiffs and "The City" was not deemed adversarial and the plaintiffs believed that as citizens, their government, particularly local government, was there to serve and protect their rights. "The City" by their ostensible conduct led plaintiffs to believe that they would protect their rights.

132. That the relationship between the plaintiffs and "The Developer" was deemed by the plaintiffs to be one of a prospective good neighbor. "The Developer" by letters and advertisements and public relations, as well as by the numerous occasions the plaintiffs have interfaced with them, make every effort to create the image of the "good neighbor" and to be of service to the community.

133. That the plaintiffs, based upon their justified perception of the defendants, trusted in them and in good faith relied on them because of the aforesaid special relationship which was tantamount to a fiduciary relationship.

134. That the plaintiffs allege that because of the above allegations they did not perceive that they were in imminent danger of being damaged and prejudiced and being denied their constitutional rights and the loss of valuable protected property rights. That the plaintiffs did not discover, nor under the circumstances hereinabove alleged could they have discovered through the exercise of reasonable diligence, until the middle of September 1991 did they discover the true state of the facts.

135. That the plaintiffs allege that it would be manifestly unjust to deprive the plaintiffs of a cause of action before the plaintiffs were aware that they had been damaged based upon the facts alleged herein.

136. That the plaintiffs further allege that because the defendants are guilty of continuing violations and further because the causes of action herein alleged show that the actions are based on progressively developing and continuing wrongs, and the nature and extent and the permanence of the harm is at this time difficult to determine and/or discover, the running of the period of limitations should, in the interest of justice, should

be suspended until discovery of, or the opportunity to discover the facts.

137. That the plaintiffs allege that it would be inequitable and unjust to permit the defendants and each of them from raising a bar to plaintiffs' claims based upon limitations. That based upon the allegations herein, the defendants neglected to furnish a meaningful notice to plaintiffs and lulled them into a false sense of security. That the defendants knew of the statute of limitations and further knew that they lulled plaintiffs into sleep, and that plaintiffs in reliance on their conduct were ignorant of the limitations and were damaged thereby, all as hereinabove alleged.

138. That the egregious conduct of "The City" in the misleading notice that they did give the plaintiffs of the sham hearings had in this matter should bar them from raising the defense of limitations. That based upon the facts herein alleged and upon considerations of fairness and justice, "The City" should be prevented from raising the defense of the statute of limitations contained in Government Code §66499.37.

139. That by virtue of the acts and omissions of "The City" as herein described and "The Developer" as hereinafter described, these defendants conspired and attempted to hinder, impede, obstruct or defeat the due course of justice with intent to injure plaintiffs and to deny them their rights under the United States Constitution as aforesaid and within the meaning of 42 U.S.C. §§1983, 1985(2) and (3) and 1986.

140. That the limitations period of ninety days contained in §66499.37 of the Government Code, as used in connection with the "S.M.A." is unconstitutional on its face as well as upon the facts alleged in this complaint, as applied to plaintiffs. It is a trap, to invite contiguous property owners into a hearing which is designed and applied merely to evoke and record a public response. It is manifestly inequitable as to amount to a total denial of justice and is unconstitutional. Without any notice that it is to be a predeprivation of property proceeding, and further, not to be given any notice of the decision or the fact that you must seek judicial review within ninety days of the decision or

you will be denied a remedy is so shocking as to stun a person of average sensitivity.

WHEREFORE, plaintiffs request judgment as follows against "The City":

A. For a money judgment based upon the difference in value of the plaintiffs' property between its fair market value prior to the "taking" by the acts herein complained about, and the fair market value after the "taking" as aforesaid;

B. For a money judgment based on the value of the loss of plaintiffs' use and enjoyment of their property for the period involved;

C. For a money judgment for the interest on the judgment entered commencing when plaintiffs notified "The City" of the nature and extent of their claim;

D. For a money judgment for general damages in an amount according to proof;

E. For injunctive relief based upon the Court's discretion and upon the complaint generally and as specified in paragraphs 99 and 100;

F. For reasonable attorney's fees pursuant to Title 42 of the United States Code, Section 1988. Sections 1988(b) provides in part as follows:

> "Attorney's Fees. ¶In any action or proceeding to enforce a provision of sections . . . of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs."

G. For reasonable appraisal, engineering and other expert fees according to proof and §1988(c) which provides in words and figures as follows:

> "Expert Fees. ¶In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981

or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee."

H. For costs of suit herein incurred; and

I. For such other and further relief as the Court deems proper.

DEMAND FOR JURY TRIAL AND VIEW

PLAINTIFFS REQUEST TRIAL BY JURY AND THAT THE JURY BE PERMITTED TO VIEW THE "FAIRWAYS PROJECT" AND THE PLAINTIFFS' PREMISES.

FIFTH CAUSE OF ACTION

Deprivation of Rights Under Color of State Law
[42 U.S.C. §§1983, 1985, 1986 and 1988]
(Plaintiffs vs. "The Developer")

141. Plaintiff incorporates paragraphs 82 through 140 of their Fourth Cause of Action in their Amended and Supplemental Complaint as though fully set out here including the exhibits attached thereto.

142. The above referred to order and ruling of July 27, 1992 and confirmed on August 7, 1992, also provided in part as follows:

> "2. PLAINTIFFS' SECOND CAUSE OF ACTION IS DEFICIENT IN THAT THE ALLEGEDLY WRONGFUL ACTS WERE ADMITTEDLY UNDERTAKEN WITH EXPRESS PUBLIC APPROVAL. A NUISANCE CLAIM MAY NOT BE BROUGHT FOR ACTIONS DONE OR MAINTAINED UNDER THE EXPRESS AUTHORITY OF A STATUTE, PER CIVIL CODE §3492.

THE DEMURRER TO THE SECOND CAUSE OF ACTION IS SUSTAINED WITHOUT LEAVE TO AMEND."

143. As hereinabove alleged in detail this is an action for the deprivation of plaintiffs constitutional rights under color of law brought pursuant to the federal Civil Rights Act. "The Developer," a private entity, deprived the plaintiffs of their protected rights of being free from the governmental taking of their property without just compensation, and being denied procedural and substantive due process as well as equal protection under the law as herein more fully detailed.

144. Fieldstone/La Costa Associates Limited Partnership, a California Limited Partnership ("The Developer") is the largest single land owner of residential real estate in the La Costa area of the City of Carlsbad. It is, and has been for a number of years, actively engaged in planning and constructing new residential communities and holds itself out and does business under the assumed name of "Fieldstone of La Costa."

145. "The Developer" has a large staff and retains outside consultants and contractors to plan and develop its new subdivisions. "The Developer" has been working with "The City" for five years or more on its "Fairways Project."

146. The plaintiffs allege that in "The Developer's" original plan for the "Fairways Project" submitted to both the planning department and the planning commission of "The City," located the access to said project on Alicante Road.

147. That the plaintiffs, prior to purchasing their home, investigated the proposed development below and adjacent to their property and were satisfied as to the proposed density, height and style of the homes to be built, and also relied on the location of the gate which was to be on Alicante Road. At that time, plaintiffs had no reason to believe that the gate to the development would be relocated across the street from them and would result in the nuisance, trespass and air pollution caused by the increased volume of traffic to their home. Plaintiffs were the first purchasers and selected their location over the other thirty-seven that were available in their development.

148. The plaintiffs were justifiable in their reliance on these facts, as well as the residential character of the road that they would be contiguous to and had a vested property right in them, never expecting "The City" to divert the heavy traffic of Alicante Road to Corte de la Vista and to relocate the gate to the project across the street from their home, or "The Developer" to concur and/or conspire in that decision.

149. The first notice that the plaintiffs had that the access may be located on Corte de la Vista (across the street from plaintiffs' homes) was on or about the 10th day of May, 1990, at "The Developer's" local office in La Costa.

150. The plaintiffs promptly made their objections to the location of access to the "Fairways Project" to "The Developer;" to "The City's" Planning Department and Planning Commission; as well as to the City Council and was met by indifference and refusal to lessen, mitigate or modify, or change their decision.

151. "The Developer" never made any public objection to "The City's" decision to relocate the access of the "Fairways Project." "The Developer" also failed to exhaust its administrative remedies or seek judicial review of "The City's" decision. "The Developer" knew or should have known that the relocating of the only gate to the "Fairways Project" to Corte de la Vista would result in damages to the property of others, and result in a nuisance, trespass and air pollution, but breached its duty to plaintiffs by failing to take any action to prevent or mitigate that result.

152. Commencing in August of 1991, "The Developer," with "The City's" full authorization, direction and approval, commenced construction of "The Fairways Project" in a manner which constitutes an unconstitutional taking and a deprivation of plaintiffs' constitutional rights. Noise, noxious odors and dirt in the form of dust are blown onto plaintiffs' property by prevailing winds by "The Developer's" failure and refusal to take all necessary and reasonable precautions to prevent, reduce, or mitigate the emissions as aforesaid.

153. The aforementioned occupation, use, and maintenance of the "Fairways Project" was the result of the negligent manner in which "The Developer" performed the construction, and

created a nuisance, and is the cause in fact of its damages. Such occupation substantially and unreasonably interferes with the comfortable use and enjoyment of plaintiffs' property, and may well be harmful to plaintiffs' health and is the proximate cause of the unconstitutional taking of their property.

154. On or about August 7, 1991, the plaintiff gave written notice to the "The Developer" of the injury the plaintiffs have experienced and expect to experience in the future (see plaintiffs' Exhibit "A"). Plaintiff requested "The Developer" to abate such unreasonable activity, but they have refused and continue to refuse to abate their activities as aforesaid to this date and at all hours of the day and night and in violation of "The City's" ordinance.

155. As a result of "The Developer's" acts and omissions as aforesaid, plaintiffs have been, and will be damaged by: (a) being denied the full use and enjoyment of their property; (b) the cost and or personal labor in cleaning the walks, furniture, windows and other appurtenances on a daily basis; (c) the value of the property has and will continue to decline unless this activity is abated; (d) and may be hazardous to the plaintiffs' health. As a direct and proximate result of said acts and omissions the plaintiffs have been denied their constitutionally protected rights as aforesaid.

156. That as a result of the acts of commission and omission as aforesaid, "The Developer" and "The City" are acting with full knowledge of the damages being caused to plaintiffs. Defendants' conduct is willful, oppressive and malicious. Accordingly, plaintiffs are entitled to punitive damages against "The Developer."

157. The above described dust, dirt, odors and noise have persisted and continue to persist. Plaintiffs have been denied the valuable use and enjoyment of their terrace and have been forced to keep their doors and windows closed. The focal point and value of plaintiffs' property is the terrace (for the view and the prevailing winds from the ocean), all aspects of which have been destroyed or substantially reduced; they are the primary reason for the value of the property and the exclusive reason why plaintiff purchased the property at a premium and spent an

additional amount in excess of $50,000.00 to enhance the outdoor terrace (see Group Exhibit "B").

158. The activities above described interfere with plaintiffs' possession of their property and have substantially diminished the value of their property and constitute a deprivation of their constitutional rights as aforesaid. Unless "The Developer" abates such conduct, the plaintiffs will be denied the full use and enjoyment of their property during the site preparation, which has continued over a year, and the construction, which will take several more years.

159. The vibrations, fumes and noise are offensive to the senses and deny plaintiffs the free use and enjoyment of their property. Such interference with plaintiffs' comfortable enjoyment of life and property has resulted in the substantial reduction in the market value of their property.

160. The activities above described are "continuing" and will presumably come to an end. However the activities that can be expected to start when construction is complete and the 132 homes are occupied will be "continuing and permanent" resulting in the permanent taking of their property as aforesaid.

161. That as a direct result of the dust, dirt, debris, noxious odors, flashing lights at night and street noise, the plaintiffs have been and will continue to be peculiarly and substantially damaged.

162. That the diversion of traffic to the access of the "Fairways Project" across the street from the plaintiffs' homes has caused a destruction of the valuable property rights and rendered their property untenantable. The unique property rights formerly enjoyed by the plaintiffs was the essence of the reason they purchased the property and paid a premium for its location and view.

163. The view is still there but cannot be enjoyed because of the dirt, noise and air pollution, as aforesaid.

164. The essence of the acts and omissions of the "The Developer" hereinabove described is that it damages, if not destroys, the plaintiffs' personal enjoyment of their terrace. It also has the effect of lessening the value of the property and may affect the health of the plaintiffs. It also requires that doors

and windows be kept closed at all times, and thereby will be forcing the plaintiffs to install air conditioning which they cannot tolerate.

165. Upon completion of the "Fairways Project," "The Developer" or its successors-in-title will cause continued air pollution, increasing the amount of ozone, exhaust contaminants, carbon monoxide, and fine particles that will be injurious to plaintiffs and their property as herein more fully alleged all as a direct result of their acts and omissions as aforesaid.

166. As a result of "The Developer's" acts and omissions as aforesaid the value of plaintiffs' real property has been diminished by not less than $100,000.00, and further, they have been denied the full use and enjoyment of their property, and unless abated plaintiffs' property will progressively diminish in value.

167. The exact damages that have been and will continue to be inflicted on the plaintiffs cannot at this time be determined, but will include loss of value, loss of use, clean-up expenses, repairs, and possible personal injuries. As a result of such injuries, plaintiffs have suffered general damages in an amount according to proof.

168. "The Developer" and "The City" are acting with full knowledge of the consequences and damages being caused to the plaintiffs, and their conduct is willful, oppressive, and malicious. Accordingly, plaintiffs are entitled to punitive damages against "The Developer" in a sum to be determined by the jury.

169. "The Developer" has failed to minimize the pollution caused by their site preparation, and further, has failed to implement a program of clean-up activities so as to allow the plaintiffs to make full use and enjoyment of their outdoor terrace, living, recreation and entertainment center.

170. The successor in title to "The Developer" will be the 132 homeowners. Unless the new owners are enjoined from continuing the nuisance, the plaintiffs will suffer permanent and continuing damages and deprivations of their constitutional rights. The result of such habitability will cause the plaintiffs

irreparable injuries such as the usefulness and the economic value of the plaintiffs' property will be substantially diminished and the plaintiffs will be deprived of the comfortable enjoyment of their property.

171. The diversion of traffic to the access of the "Fairways Project" has an effect on the possession of the real estate that the prospective purchasers will occupy as their residences as herein alleged.

172. That because plaintiffs may seek a permanent injunction against the prospective owners, and further, because the possession of residences will be affected by the location of the access to the "Fairways Project," it is reasonable and necessary to give them actual or constructive notice of the pendency of this action, as well as to the current and subsequent encumbrances.

173. An actual controversy has arisen and now exists between "The Developer" and their successor in title. That considerations of judicial economy as well as providing the parties an opportunity to mitigate their damages make a judicial declaration both necessary and appropriate.

174. That based on the facts hereinabove alleged, "The Developer" has caused and is causing a deprivation of plaintiffs' constitutional rights as aforesaid during the preparation of the site and the construction of the "Fairways Project;" and will be creating a condition that will create a continuing and permanent condition that will be maintained by its successor in title by permitting close to 1,500 vehicle trips a day (more than one a minute every minute of the day and night) that will come in and out of the access gate and on to Corte de la Vista located across the street from the plaintiffs' property.

175. Plaintiffs are informed and believe and thereon allege that "The Developer," as a result of their acts and omissions as aforesaid, failed to resist or exhaust its administrative and legal remedies to challenge "The City's" decision to divert the traffic from Alicante Road to Corte de la Vista and funnel all of said traffic into one access point which is located across the street from the plaintiffs' home. That the plaintiffs have repeatedly notified "The Developer" of their objections and the nature and

extent of the damages that would flow from the decision as aforesaid.

176. Plaintiffs allege that "The Developer" knew that the benefits of going along with "The City's" decision were greater than the loss the plaintiffs would suffer and that they would rather take the risk of a lawsuit from the plaintiffs.

177. The "cooperation" of "The Developer" with "The City" is tantamount to a conspiracy and the plaintiffs allege on information and belief that an indemnification agreement exists between these defendants relating to the potential damages of the plaintiff and that in any event these defendants should be held jointly and severally liable to the plaintiffs for their damages as a result of the acts and omissions of these defendants in depriving these plaintiffs of their constitutional rights under color of law as more fully alleged herein.

178. That the temporary, continuing and reversible condition that "The Developer" created by the manner in which they performed the site preparation of the "Fairways Project" is ongoing, but based on reasonable expectations the site preparation will be completed in another year and the construction of the 132 homes within three years.

179. On the other hand, "The Developer's" failure to challenge "The City's" decision to divert the traffic from Alicante Road to Corte de la Vista and focus all the ingress and egress traffic for the "Fairways Project" across the street from plaintiffs' home, or to actively cooperate with "The City" implementing said decision for its self-aggrandizement, will result in a continuing and permanent condition as a further result of "The Developer's" failure to challenge and/or in their active cooperation with "The City" in connection with implementing said decision.

180. "The Developer" at all times herein mentioned, in connection with the manner in which they performed their construction, and in their failure to challenge "The City's" decisions, and/or by actively cooperating with "The City" in connection with implementation of said decision, was acting under color of "The City's" ordinances, policy and custom.

181. "The Developer" at all times herein mentioned that are material was, in connection with the "Fairways Project," a licensee-permittee pursuant to an extensive system of governmental regulations based on state law and "The City's" ordinances, policy and custom.

182. That based on the facts herein alleged and the further fact that "The Developer" is a financial contributor to "The City's" sponsored social and community functions, there exists a close nexus between "The City" and "The Developer."

183. That by virtue of the nature of the functions performed by "The Developer" it is manifest that they are functions that are traditionally performed by "The City."

184. That based upon the facts herein alleged the plaintiffs state that "The Developer" at all times material in relationship to the "Fairways Project" was acting under color of law.

185. That by reason of "The Developer's" conduct, plaintiffs were deprived of their rights, privileges and immunities secured by them under the Constitution of the United States and laws enacted thereunder as herein alleged.

186. That as a proximate result of "The Developer's" conduct as alleged above, the plaintiffs have sustained damages as alleged above in an amount according to proof.

187. As a further proximate result of "The Developer's" conduct, plaintiffs' interests were damaged and/or destroyed in an amount according to proof.

188. The above-recited conduct of "The Developer" in depriving plaintiffs of their constitutionally protected rights were done with evil motive or intent, or with reckless or callous indifference to plaintiffs' rights.

189. Plaintiffs are informed and believe and thereon allege that "The Developer" will continue with "The City" their unlawful conduct, unless and until restrained by this court. If "The Developer" is not restrained, as herein alleged, plaintiffs will continue to suffer immediate, irreparable injury from the ongoing and reasonably expected deprivation of their rights.

WHEREFORE, plaintiffs request judgment against "The Developer" as follows:

A. That the defendant be restrained from the manner in which it is performing the construction so as to prevent and/or minimize the damages to plaintiffs and their property;

B. That the defendant be restrained from the use of the access to the "Fairways Project" on Corte de la Vista;

C. That the defendant be mandatorily required to do whatever is deemed reasonable and necessary to implement the Court's injunction;

D. A judicial declaration as to the rights and duties of the parties;

E. That upon notice, motion, and points and authorities, the Court conduct a hearing to determine the propriety of granting plaintiffs their right to file a Lis Pendens notice with the County Recorder in accordance with Code of Civil Procedure §§409-409.9;

F. Set a day certain for a jury trial, providing the parties with sufficient time to prepare their case for trial;

G. For general damages in an amount according to proof;

H. For punitive damages in an amount appropriate to punish the defendant for its wrongful conduct and set an example for others;

I. For reasonable attorney's fees pursuant to Title 42 of the United States Code §1988(b), which provides in part as follows:

> "Attorney's Fees. ¶In any action or proceeding to enforce a provision of sections . . . of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs."

J. For reasonable appraisal, engineering and other expert fees according to proof and §1988(c) which provides in words and figures as follows:

"Expert Fees. ¶In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee."

K. For costs of suit herein incurred; and

L. For such other and further relief as the Court deems proper.

Dated: August 31, 1992

THOMAS A. MASS
Plaintiff In Pro Per

JANET A. MASS
Plaintiff In Pro Per

DEMAND FOR JURY TRIAL AND VIEW

PLAINTIFFS REQUEST TRIAL BY JURY AND THAT THE JURY BE PERMITTED TO VIEW THE "FAIRWAYS PROJECT" AND THE PLAINTIFFS' PREMISES.

VERIFICATION

I, THOMAS A. MASS, am one of the plaintiffs in the above-entitled action. I have read the foregoing AMENDED AND SUPPLEMENTAL COMPLAINT FOR PLAINTIFFS' CAUSES OF ACTIONS BASED ON THE DEPRIVATION OF THEIR RIGHTS SECURED BY THE UNITED STATES CONSTITUTION, REQUESTING MONEY DAMAGES, DECLARATORY RELIEF AND EQUITABLE RELIEF INCLUDING AN INJUNCTION, and know the contents thereof. The same is true of my own knowledge except as to those matters which are therein alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Carlsbad, California, this 31st day August, 1992.

THOMAS A. MASS
2851 Torry Court
Carlsbad, CA 92009
Phone: (619) 931-0100
FAX: (619) 438-7850

PROOF OF SERVICE OMITTED IN PRINTING

FIELDSTONE LA COSTA

August 10, 1992

Dear Neighbor:

We are pleased to announce the completion of grading and utilities placement work at our new community of Fairways. To demonstrate our appreciation for your patience and understanding during this process, we have arranged for Clean Care, Inc. to wash the exterior of your homes windows.

You can schedule an appointment for this complimentary service by calling Lou Muth at 727-9560 between August 15 and August 29. We cordially ask that you make your appointment during this designated schedulign period.

It has been a pleasure getting to know our neighbors at Alicante Hills. We hope our window washing program will amend any inconveniences we've caused your family.

Again, thank you for your cooperation.

Sincerely,

CHERYL BRADSTREET
COMMUNITY RELATIONS

P.S. Fairways will celebrate its grand opening this fall. We hope your family can come take part in the festivities.

CB/ml

EXHIBIT F